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The "Right to Commit Nuisance" in North Carolina: A Historical Analysis of the Right-to-Farm Act

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The “Right to Commit Nuisance”¹ in North Carolina: A Historical Analysis of the Right-to-Farm Act*

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1. The title adopts a phrase used by Neil Hamilton to describe the evolution of right-to-farm laws across the country. Neil D. Hamilton, *Harvesting the Law: Personal Reflections on Thirty Years of Change in Agricultural Legislation*, 46 CREIGHTON L. REV. 563, 577–78 (2013) (“[T]he reality is that many states took the idea and applied it much broadly to protect any livestock facility meeting regulatory requirements, even those in existence after the neighboring homes. This action, in effect, turned the laws into a ‘right to commit nuisance’ rather than a right to farm.”).

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INTRODUCTION

At the heart of disputes between neighboring property owners, changing societal values and public policy concerns have shaped both common law nuisance and environmental law. In particular, disputes over agricultural land use provide an important touchstone for the evolution of property rights within a developing society. The underlying conflict between agricultural production and the property rights of neighboring landowners was evident in early English common law. In *William Aldred's Case*,² the Court of the King's Bench recognized “[a]n action on the case lies for erecting a hogstye so near the house of the plaintiff that the air thereof was corrupted.”³ A seminal case in nuisance law dating back to 1611, *William Aldred's Case* helped form the foundation of nuisance law in the early common law.⁴

Prior to the enactment of comprehensive environmental laws in the United States, the legal system relied principally on tort law remedies—such as those provided in *William Aldred's Case*—to rectify environmental harms in this country.⁵ Even after the advent of environmental statutes, the common law of nuisance continues to provide an important legal tool for aggrieved landowners seeking to protect their asserted right to the enjoyment of their property.⁶ In North Carolina, the development and evolution of nuisance law as it relates to agriculture provides insight into the changing landscape of agricultural production in the state, as well as the relationship between common and statutory law. New laws restricting nuisance claims against agricultural producers unduly restrict the property rights of neighboring landowners and raise serious constitutional concerns.

2. *William Aldred's Case*, (1611) 77 Eng. Rep. 816; 9 Co. Rep. 57 b.

3. *Id.* at 816; 9 Co. Rep. at 57 b.

4. See Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 765–71 (1979) (discussing the development of nuisance law in English common law).

5. Mark Latham, Victor E. Schwartz & Christopher E. Appel, *The Intersection of Tort and Environmental Law: Where the Twains Should Meet and Depart*, 80 FORDHAM L. REV. 737, 738–39 (2011).

6. See *id.* at 753–54.

The development of industrial agriculture in North Carolina has imposed an enormous environmental burden on rural communities. Over the past several decades, the agricultural industry in the state has transitioned from small, family farms to large industrial facilities, especially within the livestock industry.⁷ As a result, these industrial facilities, housing hundreds—if not thousands—of animals, have become concentrated in certain rural communities.⁸ Reports from rural residents living near industrial hog facilities reveal the burden placed on these communities:

On the coastal plain of eastern North Carolina, families in certain rural communities daily must deal with the piercing, acrid odor of hog manure—reminiscent of rotten eggs and ammonia—wafting from nearby industrial hog farms. On bad days, the odor invades homes, and people are often forced to cover their mouths and noses when stepping outside. Sometimes, residents say, a fine mist of manure sprinkles nearby homes, cars, and even laundry left on the line to dry.⁹

These and other anecdotal reports provide compelling evidence of ongoing environmental harm.¹⁰ However, over 400 years after *William Aldred's Case*, landowners living near these agricultural operations in North Carolina no longer enjoy the same protections under common law nuisance.

In response to growing concerns about the encroachment of urban development on agricultural communities, North Carolina and other states across the country enacted “right-to-farm” (“RTF”) laws to protect existing agricultural operations from nuisance actions.¹¹ Enacted in 1979, the original North Carolina RTF law provided preexisting agricultural operations with an affirmative defense to

7. See *infra* notes 36 and accompanying text.

8. See *infra* notes 43–47 and accompanying text.

9. Wendee Nicole, *CAFOs and Environmental Justice: The Case of North Carolina*, 121 ENVTL. HEALTH PERSP. A182, A183 (2013), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3672924/?report=reader> [<https://perma.cc/FGD3-EYAJ>].

10. See Letter from EarthJustice to Gina McCarthy, EPA Administrator, at 18–33 (Sept. 3, 2014), <http://earthjustice.org/sites/default/files/files/North-Carolina-EJ-Network-et-al-Complaint-under-Title-VI.pdf> [<https://perma.cc/2ACL-PEUQ>] (stating the grounds for a Title VI Civil Rights Act complaint against the North Carolina Department of Environment and Natural Resources, and documenting the adverse impacts of swine concentrated animal feeding operations (“CAFOs”) on residents in eastern North Carolina).

11. See Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 118 & n.108 (1983).

liability in a nuisance action, subject to certain limitations.¹² As interpreted by the North Carolina Court of Appeals, the 1979 RTF law codified a “coming to the nuisance” defense for preexisting agricultural operations, designed to discourage subsequent residential landowners from bringing nuisance claims against such facilities.¹³ While the original justification for RTF laws may have seemed reasonable at the outset, some states have extended these statutory protections well beyond their originally intended purpose.¹⁴ As a result, many of these amended RTF statutes have effectively created a “right to commit nuisance” as opposed to a “right to farm.”¹⁵

The extensive protections afforded to agricultural facilities under RTF laws call the underlying justification for these laws into question. RTF laws not only interfere with the property rights of neighboring landowners,¹⁶ but may also restrict the efficient allocation of land use¹⁷ and render agricultural producers less sensitive to the effect of their operations on rural communities.¹⁸ The relative impact of these laws on agricultural nuisance suits has been difficult to quantify.¹⁹ In light of the continuing development of industrial agriculture, some courts, including the North Carolina Court of Appeals, have narrowly interpreted RTF statutes to address the equitable concerns of neighboring landowners.²⁰ Thus, in spite of the statutory protections under RTF laws, some plaintiffs have succeeded in bringing successful

12. Act of Mar. 26, 1979, ch. 202, 1979 N.C. Sess. Laws 140, 140–41 (codified as amended at N.C. GEN. STAT. §§ 106-700 to -701 (2015)). See Grossman & Fischer, *supra* note 11, at 119.

13. See *Mayes v. Tabor*, 77 N.C. App. 197, 201, 334 S.E.2d 489, 491 (1985); Grossman & Fischer, *supra* note 11, at 119–20.

14. See Hamilton, *supra* note 1, at 577–78; David Bennett, *Right to Farm Laws Being Tweaked Across Nation*, DELTA FARM PRESS (Aug. 7, 2013), <http://deltafarmpress.com/government/right-farm-laws-being-tweaked-across-nation?page=1> [https://perma.cc/L7GC-4CEY] (noting Attorney Rusty Rumley’s views on various states’ RTF laws).

15. Hamilton, *supra* note 1, at 577–78.

16. See Terence J. Centner, *Nuisances from Animal Feeding Operations: Reconciling Agricultural Production and Neighboring Property Rights*, 11 DRAKE J. AGRIC. L. 5, 6 & n.7 (2006); Hamilton, *supra* note 1, at 577–78; Alexander A. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1738 (1998).

17. See Centner, *supra* note 16, at 6–7 & n.10.

18. *Id.* at 6–7; Joshua M. Duke & Scott A. Malcolm, *Legal Risk in Agriculture: Right-to-Farm Laws and Institutional Change*, 75 AGRIC. SYS. 295, 299 (2002) (observing that the existence of right-to-farm acts could create a perception of invulnerability from nuisance actions among agricultural producers that would affect decisions regarding farm management).

19. Duke & Malcolm, *supra* note 18, at 298–99, n.2 (noting the difficulty in obtaining data on unpublished cases or the number of agricultural nuisance suits filed and resulting uncertainty regarding the deterrent effect of such laws).

20. See *infra* Section II.C.

nuisance actions against agricultural facilities.²¹ In response, several state legislatures have expanded their RTF laws to effectively codify a “right to commit nuisance” for agricultural facilities at the expense of neighboring landowners and the surrounding communities.²²

Recent events in North Carolina shed light on this developing trend. On July 18, 2013, North Carolina enacted significant amendments to its RTF law, drastically expanding the protections from nuisance actions available to agricultural facilities.²³ Under the amended RTF law, an agricultural operation may raise an affirmative defense to liability in a nuisance action regardless of whether it had undergone a change in ownership, size, or type of product produced.²⁴ As a result, agricultural operations may be able to benefit from these protections regardless of whether the facility actually preceded its neighboring landowners.²⁵

The legislation was enacted only weeks after the initial filings of nuisance suits against Murphy-Brown, LLC, a subsidiary of the pork producer Smithfield Foods, Inc.,²⁶ for the operation of industrial hog facilities in eastern North Carolina.²⁷ Over 400 plaintiffs filed claims

21. See discussion *infra* Sections II.B, II.C.

22. See Hamilton, *supra* note 1, at 577–78; *infra* Section III.A (discussing recent nuisance litigation and resulting legislative proposals).

23. Act of July 18, 2013, ch. 314, sec. 1, § 106-701, 2013 N.C. Sess. Laws 858, 858–59 (codified as amended at N.C. GEN. STAT. § 106-701 (2015)).

24. *Id.* The amended law also provides that a forestry or agricultural facility that employs a new technology or interrupts operations for less than three years may still benefit from the affirmative defense to nuisance actions under the RTF law. *Id.*

25. See *id.*; *infra* notes 209–220 and accompanying text (discussing the scope of the changes within the amended statute).

26. Smithfield Foods is a \$15 billion global food company, considered to be the world’s largest pork processor and hog producer. *Company Profile & History*, SMITHFIELD FOODS, <http://www.smithfieldfoods.com/about-smithfield/company-profile> [https://perma.cc/V9SQ-AAJA]. In 2013, the Chinese company Shuanghui International purchased Smithfield for \$4.7 billion dollars. Christopher Doering, *Smithfield Shareholders OK \$4.7B Sale to China Firm*, USA TODAY (Sept. 24, 2013, 10:41 AM), <http://www.usatoday.com/story/money/business/2013/09/24/smithfield-vote-china-deal/2859551/> [https://perma.cc/3HB5-YGDU].

27. See Request for Prelitigation Mediation of Farm Nuisance Dispute, Exhibit B, *Blanks v. Smithfield Foods, Inc.*, No. 13-R-685 (N.C. Super. Ct. July 3, 2013); Will Michaels, *N.C. Hog Farm Neighbors File Nuisance Complaints*, WUNC (July 8, 2013), <http://wunc.org/post/nc-hog-farm-neighbors-file-nuisance-complaints#stream/0> [https://perma.cc/LBW3-U3U8]. Under North Carolina law, a plaintiff is required to file a request for prelitigation mediation prior bringing an agricultural nuisance suit. N.C. GEN. STAT. § 7A-38.3(d) (2015). Indeed, a comparison of the timeline of the litigation to that of the proposed legislation suggests that the legislation was modified to ensure its applicability to the pending litigation. See *infra* notes 206–208 and accompanying text.

in North Carolina state court against Murphy-Brown.²⁸ The cases were subsequently re-filed in the United States District Court for the Eastern District of North Carolina.²⁹ The district court has issued preliminary rulings,³⁰ and, as of the writing of this Comment, the cases remain pending.³¹ Murphy-Brown has expressly raised the North Carolina RTF statute as an affirmative defense to liability in the pending litigation.³²

These cases may provide one of the first opportunities for courts to interpret North Carolina's recently amended RTF law. In contrast to the landowner in *William Aldred's Case*, some or all of these neighboring landowners could find themselves without a legal remedy. However, the exact scope of the protections afforded to

28. The complaints were originally filed in the North Carolina Superior Court, Wake County, on July 30, 2013. *See, e.g.*, Complaint at 1, Alderman v. Smithfield Foods, Inc., No. 13-CV-10322 (N.C. Super. Ct. July 30, 2013). The complaints included as defendants both the "integrator" company that owned the hogs, Murphy-Brown, LLC, and various "local growers" who owned or operated the facilities where the hogs were raised. *See id.* at 4. In total, twenty-five complaints were filed in state court, including approximately 440 individual plaintiffs. *See* Motion to Designate Case as Exceptional at 2, Alderman v. Smithfield Foods, Inc., No. 13-CV-10322 (N.C. Super. Ct. Oct. 7, 2013). The plaintiffs subsequently motioned to dismiss without prejudice the claims against the "local growers." *See, e.g.*, Plaintiff's Notice of Partial Dismissal at 1, Alderman v. Smithfield Foods, Inc., No. 13-CV-10322 (N.C. Super. Ct. Sept. 30, 2013).

29. With the remaining state court lawsuits pending, the Plaintiffs commenced the filing of federal lawsuits on August 21, 2014. *See, e.g.*, Complaint, McMillon v. Murphy-Brown, LLC, No. 4:14-CV-00155-BO, (E.D.N.C. Aug. 21, 2014). The plaintiffs subsequently served and filed motions to dismiss without prejudice for the twenty-five pending cases in state court pursuant to N.C. R. Civ. P. 41(a)(1). Plaintiff's Notice of Partial Dismissal, *supra* note 28, at 1; Plaintiff's Notice of Dismissal at 1, Alderman v. Smithfield Foods, Inc., No. 13-CV-10322 (N.C. Super. Ct. Sept. 2, 2014).

30. *In re* N.C. Swine Farm Nuisance Litig., No. 5:15-CV-13-BR, 2015 U.S. Dist. LEXIS 84714, at *16–17 (E.D.N.C. June 29, 2015) (granting in part and denying in part defendant's motion to strike contents of the plaintiff's complaints, ordering plaintiff to strike all references to Chinese government in legal arguments, photographs, and declarations); *In re* N.C. Swine Farm Nuisance Litig., No. 5:15-CV-13-BR, 2015 U.S. Dist. LEXIS 83157, at *78, *80 (E.D.N.C. June 24, 2015) (denying defendant's motion to dismiss plaintiffs' claims for "annoyance" damages associated with temporary nuisance).

31. As of the date of this writing, twenty-six lawsuits are pending in the Eastern District of North Carolina, all of which name Murphy-Brown, LLC as the sole defendant. The complaints encompass over 500 individual named plaintiffs. *See* Motion to Designate Case as Exceptional, *supra* note 28, at 2. The lawsuits have been organized under the matter styled as *In re* NC Swine Farm Nuisance Litig., No. 5:15-CV-13-BR (E.D.N.C.). *See, e.g.*, *In re* NC Swine Farm Nuisance Litig., No. 5:15-CV-13-BR, 2015 U.S. Dist. LEXIS 83157, at *1 (E.D.N.C. June 24, 2015).

32. *See, e.g.*, Answer to Amended Complaint at 51, Gillis v. Murphy-Brown, LLC, No. 7:14-CV-185-BR (E.D.N.C. Aug. 31, 2015), ECF no. 43 ("Plaintiffs' claims are barred, in whole or in part, by North Carolina's Right to Farm Act . . . Murphy-Brown states that, upon information and belief, the farm at issue began operations more than one year before Plaintiffs' alleged causes of action arose and that operations at that farm were reasonable and not a nuisance at the time they began.").

agricultural facilities under the recently amended statute remains uncertain pending further judicial review.

Contrary to the original legislative intent,³³ North Carolina's RTF statute in its current form fails to strike an appropriate balance between protecting the state's farmland and preserving the inherent right of neighboring landowners to the enjoyment of their property. This Comment addresses the potential limitations placed on plaintiffs seeking to bring a nuisance claim against a neighboring agricultural facility in North Carolina. It also evaluates the constitutional concerns raised by the recent amendments to the RTF statute and advocates for a narrower reading of the statute in light of its underlying purpose.

This Comment will proceed in four Parts. Part I will address the changing nature of the agricultural industry in North Carolina. Part II will discuss the original enactment of North Carolina's RTF law and its subsequent interpretation in the courts. Part III will then examine the passage of the 2013 amendments to the law and potential statutory interpretations of the amended statute. Finally, Part IV will present the constitutional concerns raised by the North Carolina RTF law and advocate for a narrow judicial interpretation.

I. THE CHANGING NATURE OF AGRICULTURE IN NORTH CAROLINA

While the preservation of farmland and agriculture remains a valid concern,³⁴ the broad protections afforded to agricultural facilities under the RTF law ignore the current realities of agricultural production within North Carolina, particularly in regard to livestock production.³⁵ Over the past fifty years, livestock production in the United States has shifted from traditional family farms toward mass industrial production.³⁶ To benefit from the resulting economies of scale, producers have moved away from raising livestock in traditional pastoral settings towards raising animals within

33. See *infra* note 126 and accompanying text. As originally enacted, the North Carolina RTF law codified a "coming to the nuisance" defense for preexisting agricultural and forestry facilities. See Grossman & Fischer, *supra* note 11, at 118–19, 119 n.109. As discussed in Section III.B, the amended RTF law would permit a much greater number of facilities to benefit from these protections. See *infra* Section III.B.

34. See *infra* notes 139–141 and accompanying text (discussing the ongoing loss of farmland and farms in North Carolina).

35. See Reinert, *supra* note 16, at 1736–37.

36. See Vanessa Zborek, "Yes, in Your Backyard!": Model Legislative Efforts to Prevent Communities from Excluding CAFOs, 5 WAKE FOREST J.L. & POL'Y 147, 147–49 (2015) (discussing industrialization of agriculture in the United States).

“concentrated animal feeding operations” (“CAFOs”).³⁷ Containing hundreds—if not thousands—of animals at a time,³⁸ CAFOs are a far cry from the hog sty in *William Aldred’s Case*,³⁹ posing serious environmental and public health threats to not only neighboring landowners but also surrounding community.⁴⁰ Examining the transformation of the hog industry in North Carolina provides insight into the impact of CAFOs on their neighboring communities.

A. The Rise of CAFOs and the Transformation of the Hog Industry in North Carolina

Within North Carolina, the industrialization of agriculture has been most apparent in the development of industrial hog farming.⁴¹ Beginning in the 1970s, the hog industry changed rapidly as it began to implement the CAFO model for hog production, which had already been successfully implemented in the poultry industry.⁴² The rapid expansion of hog farming in North Carolina was largely driven by the vertical integration of the livestock industry.⁴³ The co-location of large processing and production facilities has resulted in an unprecedented concentration of hog farms within eastern North Carolina.⁴⁴ In 1982, there was at least one commercial hog farm in all but one county in the state.⁴⁵ By 1997, however, ninety-five percent of

37. *Id.* at 149. The EPA defines an Animal Feeding Operation (“AFO”) as “agricultural operations where animals are kept and raised in confined situations.” *Animal Feeding Operations (AFOs)*, EPA, <http://www.epa.gov/npdes/animal-feeding-operations-afos> [http://perma.cc/PP67-C6XX]. Medium and large AFOs are classified as CAFOs. 40 C.F.R. § 122.23(b)(4), (6) (2015) (defining large and medium CAFOs, respectively). A medium CAFO may stable or confine between 200 and 699 mature dairy cows or between 750 and 2,499 hogs weighing over 55 pounds. *Id.* § 122.23(b)(6). There is no upper limit for large CAFO operations. *Id.* § 122.23(b)(4).

38. See *supra* note 37 and accompanying text.

39. See *William Aldred’s Case* (1611) 77 Eng. Rep. 816, 816; 9 Co. Rep. 57 b, 57b.

40. See Nicole, *supra* note 9, at A183–A185; Zborek, *supra* note 36, at 151–57 (discussing the effect of CAFOs on environmental and public health).

41. See John D. Burns, Comment, *The Eight Million Little Pigs—A Cautionary Tale: Statutory and Regulatory Responses to Concentrated Hog Farming*, 31 WAKE FOREST L. REV. 851, 854–56 (1996) (discussing the development of the hog industry in North Carolina).

42. See *id.* at 854 n.28; Shi-Ling Hsu, *Scale Economies, Scale Externalities: Hog Farming and the Changing American Agricultural Industry*, 94 OR. L. REV. 23, 30–34 (2015) (describing transformation of the hog industry toward contract farming and large-scale production); Nicole, *supra* note 9, at A186.

43. Burns, *supra* note 41, at 854–55.

44. *Id.*; see also Nicole, *supra* note 9, at A185–A186.

45. Nicole, *supra* note 9, at A185–A186.

the commercial hog farms were located in eastern North Carolina.⁴⁶ Currently, there are nearly 9 million hogs in the state.⁴⁷ In 2012, North Carolina ranked second in hog production in the United States, with its yearly production valued at \$2.9 billion.⁴⁸

While industrial hog facilities represent a substantial portion of the local economy in eastern North Carolina, they fail to provide a sustainable model for agricultural development in the state.⁴⁹ The operation of CAFOs has had an adverse impact on small farmers⁵⁰ and has resulted in significant amounts of pollution within the region.⁵¹ As a result of the efficiencies achieved from the economies of scale, the development of these large industrial facilities has actually resulted in a decrease in the number of farms, as well as agricultural employment.⁵² Large livestock processors within the vertically integrated system, also known as “integrators,” generally contract with local growers to raise the animals and operate these facilities, while retaining ownership of the animals and proscribing strict specifications for their care and treatment.⁵³ Commentators

46. *Id.* (citing Bob Edwards & Anthony E. Ladd, *From Farms to Factories: The Environmental Consequences of Swine Industrialization in North Carolina, 1982–2007*, in TWENTY LESSONS IN ENVIRONMENTAL SOCIOLOGY 153 (Kenneth Gould & Tammy Lewis, eds. 2008)).

47. News Release, U.S. Dep’t Agric., March 2016 Hog Report, (March 28, 2016), <http://www.ncagr.gov/stats/release/HogRelease03.pdf> [<https://perma.cc/7FAZ-TZGV>]. Over the past twenty years, the hog population has fluctuated between eight and ten million animals. N.C. DEP’T. OF AGRIC. & CONSUMER SERVS., NORTH CAROLINA AGRICULTURAL STATISTICS 43 (2015).

48. U.S. DEP’T OF AGRIC., ACH12-4, 2012 CENSUS HIGHLIGHTS: HOG AND PIG FARMING 1 (2014), http://www.agcensus.usda.gov/Publications/2012/Online_Resources/Highlights/Hog_and_Pig_Farming/ [<https://perma.cc/4RD6-3KLD>].

49. The operation of CAFOs has been sharply criticized for externalizing the costs of production on surrounding communities, while receiving significant public subsidies. See Michelle B. Nowlin, *Sustainable Production of Swine: Putting Lipstick on a Pig?*, 37 VT. L. REV. 1079, 1096–101 (2013) (providing a general critique of the economic model for CAFOs).

50. See Nicole, *supra* note 9, at A185; Burns, *supra* note 41, at 857.

51. See Nicole, *supra* note 9, at A186; Burns, *supra* note 41, at 857–61 (discussing the environmental impact of industrial hog farming and its effect on North Carolina’s fisheries and tourism industry).

52. Nowlin, *supra* note 49, at 1135–36 (noting that hog CAFO construction creates a net job loss, while investment and profits from the projects largely bypass local communities); Burns, *supra* note 41, at 857 (noting that industrial hog facilities are less labor intensive and more centralized making it difficult for small independent growers to continue operating). For example, between 1991 and 1996, the number of hog farms in North Carolina decreased by 2,200. Burns, *supra* note 41, at 857.

53. See Zborek, *supra* note 36, at 149 (describing the common ownership structure and control within the vertically integrated model).

have criticized these integrators for taking advantage of local growers who are bound by these contractual obligations.⁵⁴

The current waste management system employed by most swine CAFOs releases enormous quantities of untreated animal waste into the environment, posing serious environmental and public health threats to the surrounding communities.⁵⁵ In most swine CAFOs, waste is collected in large, underground pits beneath the slatted floors where the hogs are kept.⁵⁶ The CAFO operators periodically pump water through the storage area to flush the accumulated swine waste into large, open-air holding ponds, often referred to as “lagoons.”⁵⁷ These open-air storage ponds often store millions of gallons of swine waste.⁵⁸ The waste slurry stored in these lagoons contains high levels of nutrients as well as pathogens and bacteria.⁵⁹ The untreated swine waste is then sprayed, or otherwise land-applied, over designated “spray fields” surrounding the facility.⁶⁰

The resulting pollution is compounded by the sheer amount of waste produced at these facilities. Each hog can produce up to eight times as much waste as a human.⁶¹ The swine population in North Carolina is estimated to generate more waste in one year than the human populations of New York City, Chicago, and Los Angeles combined.⁶² These facilities cause air, water, and odor pollution affecting not only neighboring properties, but also communities

54. See, e.g., Hamilton, *supra* note 1, at 588 (noting that action is needed to “increase the protection for contract poultry and livestock growers to provide fair and equitable treatment and how to limit the use of ‘independent contractor’ claims by integrators to avoid legal responsibilities”); Nathaniel Haas, *John Oliver vs. Chicken*, POLITICO, (Jun. 1, 2015, 5:24 PM), <http://www.politico.com/story/2015/06/john-oliver-vs-chicken-118510> [<https://perma.cc/79ZG-5TYE>] (discussing recent criticism of U.S. poultry production by comedian John Oliver and recent attempts by Congress to fund a USDA program to provide contract growers with additional protections).

55. Zborek, *supra* note 36, at 151–53.

56. Nowlin, *supra* note 49, at 1087.

57. *Id.*

58. *Id.* at 1084.

59. *Id.* at 1085.

60. *Id.* at 1087. See Nicole, *supra* note 9, at A186.

61. See Nicole, *supra* note 9, at A186 (noting that hogs can produce between four to eight times as much waste as a human); Nowlin, *supra* note 49, at 1087 (noting that hogs produce approximately two to four times as much waste as a human).

62. See Hsu, *supra* note 42, at 43 (citing KATHRYN COCHRAN, JOSEPH RUDEK & DANIEL WHITTLE, *DOLLARS AND SENSE: AN ECONOMIC ANALYSIS OF ALTERNATIVE HOG WASTE MANAGEMENT TECHNOLOGIES* 7 (2000)). Using data from 2002, the U.S. Government Accountability Office (“GAO”) estimated that the 7.5 million hogs located in five contiguous counties in eastern North Carolina produced approximately 15.5 million tons of waste that year. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-944, *CONCENTRATED ANIMAL FEEDING OPERATIONS* 21 (2008).

located miles upwind or downstream of these facilities.⁶³ Swine CAFOs reduce neighboring property values and emit pollutants that threaten the physical and mental health of surrounding residents.⁶⁴ The concentration of these facilities within low-income and minority communities in eastern North Carolina has also raised significant environmental injustice concerns.⁶⁵

While state regulators and hog producers have attempted to address some of these concerns, those efforts have been insufficient to remedy the environmental impact of swine CAFOs on their neighboring communities.⁶⁶ Following growing opposition to the operation of these facilities, North Carolina imposed a temporary moratorium on the construction of new industrial swine CAFOs in 1997.⁶⁷ In 2007, the state enacted a permanent ban on new hog facilities utilizing the traditional lagoon and spray field waste management system.⁶⁸ However, these restrictions on swine facilities

63. See Nicole, *supra* note 9, at A186–A187; Zboreak, *supra* note 36, at 151–57; Burns, *supra* note 41, at 861–64 (discussing the effects of water pollution from agricultural discharges and catastrophic spills from hog facilities in North Carolina).

64. Zboreak, *supra* note 36, at 151–52. See Nicole, *supra* note 9, at A183–A185, A187; R. Jason Richards & Erica L. Richards, *Cheap Meat: How Factory Farming Is Harming Our Health, the Environment, and the Economy*, 4 KY. J. EQUINE AGRIC. & NAT. RESOURCES. L. 31, 38–39 (2012) (discussing the reduction of property values near hog CAFOs).

65. See Nicole, *supra* note 9, at A183–A184. In February 2015, the Environmental Protection Agency launched a civil rights investigation into potential violations associated with state regulation of these facilities. *EPA Launches Investigation of North Carolina for Civil Rights Violations*, EARTHJUSTICE (Feb. 25, 2015), <http://earthjustice.org/news/press/2015/epa-launches-investigation-of-north-carolina-for-civil-rights-violations-0> [https://perma.cc/S7BU-VMFG].

66. See Nicole, *supra* note 9, at A188–A189 (discussing recent reforms and existing criticisms). In 2011, the general assembly passed legislation that permitted hog producers to upgrade their buildings without improving their waste management systems as required under the original moratorium. Act of June 13, 2011, ch. 118, 2011 N.C. Sess. Laws 220, 220–21 (codified as amended at N.C. GEN. STAT. § 106-806 (2015)).

67. Nicole, *supra* note 9, at A188.

68. *Id.* The Swine Farm Environmental Performance Act of 2007 required all new or expanded facilities to adopt “environmentally superior technologies” (“ESTs”) to significantly reduce emissions and eliminate waste discharges into surface and ground waters. Act of Aug. 31, 2007, ch. 523, sec. 1, § 143-215.10I, 2007 N.C. Sess. Laws 1678, 1678–79 (codified as amended at N.C. GEN. STAT. § 143-215.10I (2015)). The Act also established a lagoon conversion program to provide funding to farmers to convert their existing lagoons to implement ESTs. *Id.* § 1, 2007 N.C. Sess. Laws. at 1680–83. Only two projects have been successfully completed under the program to date, however, and the general assembly has largely stripped the program of funding. See, e.g., N.C. DIVISION OF SOIL & WATER CONSERVATION, ANNUAL REPORT TO THE ENVIRONMENTAL REVIEW COMMISSION OF THE NORTH CAROLINA GENERAL ASSEMBLY ON THE IMPLEMENTATION OF THE LAGOON CONVERSION PROGRAM 4 (2015), <http://www.ncleg.net/documents/sites/committees/ERC/ERC%20Reports%20Received/2015/Department%20of%20Agriculture%20and%20Consumer%20Services/2015-Oct%20Lagoon%20Conv%20Prog>

were notably weakened in recent years. Hog producers are now permitted to upgrade their existing facilities and recommence using many idled facilities without having to make improvements to the existing waste management systems.⁶⁹ Even though alternative waste management technologies can and have been successfully implemented, the large majority of facilities continue to use the traditional “lagoon” and “spray field” system, citing cost as a primary concern.⁷⁰ Swine CAFOs remain a significant threat to the environment and public health within their surrounding communities.⁷¹ In light of the environmental and social harm associated with these facilities, providing extensive protections for CAFOs under the RTF law loses much of its justification.⁷²

*B. Making the Case Against Extending RTF Protections to CAFOs:
North Carolina as a Cautionary Tale*

For those making the case against extending RTF protections to CAFOs, North Carolina serves as a cautionary tale. Commentators have argued that CAFOs should be excluded altogether from the nuisance protections afforded under RTF laws.⁷³ In a 1997 opinion

%20Rpt.pdf [https://perma.cc/8FRT-N8V4]. While a few facilities have successfully implemented ESTs, the overwhelming majority of existing hog farms still operate using the traditional lagoon and spray field system. Nicole, *supra* note 9, at A188–A189.

69. Act of June 13, 2011, ch. 118, 2011 N.C. Sess. Laws 220, 220–21 (codified as amended at N.C. GEN. STAT. § 106-806 (2015)). In 2011, the general assembly passed legislation that permitted hog producers to upgrade their buildings without improving their waste management systems, as required under the original moratorium. *Id.* In addition, the previous regulations provided an exception for idled swine facilities to restart operations under the existing waste management system, provided that the facility had been out of operation for less than four years. 15A N.C. ADMIN. CODE. 2T.1302 (2015). However, the legislature recently extended this statutory exception from four to ten years. Act of Sept. 30, 2015, ch. 263, sec. 16, § 21(a), 2015 N.C. Sess. Law 513, 513–14. This change has raised concerns about the potential impact on neighboring landowners. See Gabe Rivin, *Bills Allow Idled Hog Farms to Return Under Old Environmental Standards*, N.C. HEALTH NEWS (May 22, 2015), <http://www.northcarolinahealthnews.org/2015/05/22/bills-allow-idled-hog-farms-to-return-under-old-environmental-standards/> [https://perma.cc/F4UK-WL95].

70. See Nicole, *supra* note 9, at A188–A189; Nowlin, *supra* note 49, at 1121–28 (discussing the successful implementation of improved waste management systems).

71. See Nowlin, *supra* note 49, at 1086–96 (documenting the adverse environmental and public health effects from industrial hog production).

72. See Reinert, *supra* note 16, at 1738 (stating that “[a]s envisioned, RTFs are intended to preserve open space and protect traditional rural life from urban encroachment,” but currently are used to “protect land users who themselves have contributed to a decline in the quality of rural living”).

73. See, e.g., Centner, *supra* note 16, at 11 (suggesting the implementation of size limitations for facilities that may qualify for nuisance protection or requirements to comply with best practices for odor and nutrient management); Neil D. Hamilton, *Right-*

letter, the Kentucky attorney general addressed whether industrial hog facilities could be operated in a “reasonable and prudent” manner so as to gain protection under Kentucky’s RTF law.⁷⁴ In considering whether such facilities should be protected under the statute, he noted the experience of industrial hog farming in North Carolina gave reason for pause:

The experience of North Carolina persuades us that the practice of industrial-scale hog farming is neither reasonable nor prudent. In our state, an agricultural disaster is one that strikes the agricultural community, usually from acts of nature. In North Carolina, an agricultural disaster has come to signify a disaster that strikes the community at large from acts of an agricultural producer. We do not believe that any industrial process that, intentionally or not, dumps tons of animal waste into rivers and streams can be called reasonable or prudent.⁷⁵

Reaching this conclusion in 1997, the attorney general drew heavily on the catastrophic 1995 hog waste spill in North Carolina, where a storage lagoon ruptured at Oceanview Farms, dumping nearly twenty-five million gallons of hog waste into the New River.⁷⁶ He further noted the water pollution caused by waste leaching from the lagoons as well as the airborne pollution associated with hog production at these facilities.⁷⁷

The attorney general offered textual support for his decision based on the stated purpose of the Kentucky RTF law “to conserve, protect, and encourage the development and improvement of its agricultural land.”⁷⁸ Drawing from this statement of purpose, which is strikingly similar to that of the North Carolina’s RTF law,⁷⁹ he argued

to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective, 3 DRAKE J. AGRIC. L. 103, 111–12 (1998) (describing the emergence of a “new attitude” towards industrialized swine production); Burns, *supra* note 41, at 881.

74. Op. Att’y Gen. Ky., No. 97-31, at 8–9 (Aug. 21, 1997), <http://ag.ky.gov/civil/civil-enviro/opinions/Pages/1997.aspx> [<https://perma.cc/HX73-Q2B5>].

75. *Id.*

76. *Id.* at 7–8; see Michael A. Mallin, *Impacts of Industrial Animal Production on Rivers and Estuaries*, 88 AM. SCIENTIST 2, 6 (2000).

77. Op. Att’y Gen. Ky., *supra* note 74, at 8.

78. *Id.* at 5 (citing KY. REV. STAT. ANN. § 413.072(1) (West 2015)).

79. Compare KY. REV. STAT. ANN. § 413.072(1) (West 2015) (“It is the declared policy of the Commonwealth to conserve, protect, and encourage the development and improvement of its agricultural land and silvicultural land for the production of food, timber, and other agricultural and silvicultural products.”), with N.C. GEN. STAT. § 106-700 (2015) (“It is the declared policy of the State to conserve and protect and encourage the development and improvement of its agricultural land and forestland for the production of food, fiber, and other products.”).

that extending protections to such facilities would run contrary to the stated intent of the RTF law.⁸⁰ In rejecting a broader interpretation of the statute, he noted that “[i]t is the cultivation and management of our land for agricultural operations that the legislature sought to protect, not the laboratories of science or the concrete buildings of manufacturing industries.”⁸¹

While some states have enacted reforms or adopted statutory interpretations to limit the application of these protections to CAFOs,⁸² other states, such as North Carolina, have extended protections for such facilities either under the RTF statutes or by other means.⁸³ Reviewing the development of nuisance law in North Carolina and interpretations of the RTF law prior to its amendment in 2013 will help place the protections afforded to CAFOs in context.

II. NORTH CAROLINA’S RTF ACT

The origins of North Carolina’s RTF law lie in the historical development of common law nuisance and its application to agricultural facilities. Tracing the development and interpretation of nuisance law in North Carolina provides valuable context in which to assess the statutory protections provided under the state’s amended RTF law. This Section will provide a discussion of the development of nuisance law in North Carolina and the statutory protections provided under the state’s original RTF law.

A. *Development and Interpretation of Nuisance Law in North Carolina*

Nuisance law has its historical roots in English common law.⁸⁴ *William Aldred’s Case*⁸⁵ represents one of the landmark cases in nuisance law. Establishing the common law principle of *sic utere tuo ut alienum non laedas*, *William Aldred’s Case* recognized that the use of one’s property should be limited so as not to injure that of another.⁸⁶ In rejecting the defendant’s claim that the social utility of

80. Ky. Att’y Gen., *supra* note 74, at 6–7.

81. *Id.*

82. *See, e.g.*, MINN. STAT. ANN. § 561.19 (West 2015) (limiting the application of the RTF to facilities with a capacity of less than 1,000 swine or 2,500 head of cattle).

83. *See infra* notes 191–202 and accompanying text.

84. *See* Coquillette, *supra* note 4, at 765–71 (discussing the evolution of early private nuisance law in the common law).

85. (1611) 77 Eng. Rep. 816, 821; 9 Co. Rep. 57 b, 58 b–59 a.

86. *Id.* *See* Coquillette, *supra* note 4, at 776–81 (discussing the holding in *Aldred’s Case* and the underlying principle of *sic utere tuo ut alienum non laedas*).

hog farming permitted such interference, the court in *William Aldred's Case* noted:

[T]he building of a lime-kiln is good and profitable; but if it be built so near a house, that when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it. So if a man has a watercourse running in a ditch from the river to his house, for his necessary use; if a glover sets up a lime-pit for calve skins and sheep skins so near the said watercourse that the corruption of the lime-pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it . . . and this stands with the rule of law and reason, . . . *sic utere tuo ut alienum non laedas*.⁸⁷

This concept has served as the guiding principle for the development of nuisance law in the United States, including North Carolina.⁸⁸

The Supreme Court of North Carolina has defined a private nuisance as “any substantial non-trespassory invasion of another’s interest in the private use and enjoyment of land by any type of liability forming conduct.”⁸⁹ The intentional or unintentional creation of an unreasonable interference with the enjoyment of the plaintiff’s property may give rise to an actionable claim.⁹⁰ North Carolina courts have identified two types of private nuisances: nuisance per se (or at law) and nuisance per accidens (or in fact).⁹¹ Nuisance per se is an act, occupation, or building that constitutes a nuisance under any

87. *Aldred's Case*, 77 Eng. Rep. at 821; 9 Co. Rep. at 58 b–59 a; see Coquillette, *supra* note 4, at 776.

88. See *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 193, 77 S.E.2d 682, 689 (1953) (“The law of private nuisance rests on the concept embodied in the ancient legal maxim [*sic utere tuo ut alienum non laedas*, meaning, in essence, that every person should so use his own property as not to injure that of another.”).

89. *Id.*; see NORTH CAROLINA LAW OF TORTS § 25.30 (3d ed. 2015); 4 RESTATEMENT (SECOND) OF TORTS § 821D (AM. LAW INST. 1977) (“A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land.”).

90. *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 616, 124 S.E.2d 809, 813 (1962) (“A person is subject to liability for an intentional non-trespassory invasion of an interest in the use and enjoyment of land when his conduct is unreasonable under the circumstances of the particular case; a person is subject to liability for an unintentional invasion when his conduct is negligent, reckless or ultrahazardous.”); *Whiteside Estates, Inc. v. Highlands Cove, LLC*, 146 N.C. App. 449, 455, 553 S.E.2d 431, 436 (2001) (citing *Watts*, 256 N.C. at 617, 124 S.E.2d at 813); NORTH CAROLINA LAW OF TORTS § 25.30 (3d ed. 2015). The Supreme Court of North Carolina has defined intentional nuisance within this context to mean “when the person whose conduct is in question as a basis for liability acts for the purpose of causing it, or knows that it is resulting from his conduct, or knows that it is substantially certain to result from his conduct.” *Morgan*, 238 N.C. at 194, 77 S.E.2d at 689.

91. *Morgan*, 238 N.C. at 191, 77 S.E.2d at 687; see NORTH CAROLINA LAW OF TORTS § 25.30 (3d ed. 2015).

circumstances.⁹² While the lawful operation of an enterprise does not constitute a nuisance per se,⁹³ it may still be considered nuisance per accidens “by reason of [its] location, or by reason of the manner in which [it is] constructed, maintained, or operated.”⁹⁴ However, not all intentional invasions of the use or enjoyment of another’s property constitute a private nuisance.⁹⁵

In order to establish a *prima facie* case for an intentional private nuisance, the plaintiff must demonstrate that (1) the defendant’s use of the property, under the circumstances, constituted an unreasonable invasion or interference with the plaintiff’s use or enjoyment of his property and (2) the plaintiff suffered substantial harm or injury as a result.⁹⁶ A person may be found liable for creating or maintaining a private nuisance “regardless of the degree of care or skill exercised by him to avoid such injury.”⁹⁷ The determination of reasonableness is a question of fact that is made from the perspective of an objectively

92. *Morgan*, 238 N.C. at 191, 77 S.E.2d at 687 (“A nuisance per se or at law is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.”). Traditional examples of a nuisance per se include operating a brothel or a gambling parlor. *E.g.*, *Tedeseki v. Berger*, 43 So. 960, 961 (Ala. 1907) (prostitution); *Ehrlick v. Kentucky*, 102 S.W. 289, 290 (Ky. Ct. App. 1907) (gambling); *Givens v. Van Studdiford*, 86 Mo. 149, 156 (1885) (prostitution); *Commonwealth v. Ciccone*, 85 Pa. Super. 316, 318 (1925) (gambling). A plaintiff bringing a nuisance action against an agricultural facility under this theory would have to meet a difficult burden of establishing that the activity in question constitutes a nuisance at all times and under any circumstances. *See Laux v. Chopin Land Assocs.*, 550 N.E.2d 100, 102 (Ind. Ct. App. 1990) (“Indiana has determined that the raising of hogs is not a nuisance per se.”); *Oklahoma v. Tyson Foods, Inc.*, No. 05-CV-0329-GKF-PJC, 2010 WL 653032, at *5 (N.D. Okla. Feb. 17, 2010) (granting defendant’s motion to dismiss claim under the theory of nuisance per se, holding that the state failed to establish that the defendant’s land application of poultry litter constituted a nuisance at all times).

93. *Watts*, 256 N.C. at 617, 124 S.E.2d at 813.

94. *See Morgan*, 238 N.C. at 191, 77 S.E.2d at 687.

95. *Watts*, 256 N.C. at 618, 124 S.E.2d at 814; *see* RESTATEMENT (SECOND) OF TORTS § 826 cmt. b (AM. LAW INST. 1977); *e.g.*, *Ewen v. Maccherone*, 927 N.Y.S.2d 274, 278 (N.Y. App. Term 2011) (declining to find that secondhand smoke from neighbor who smoked in own house constituted a nuisance).

96. *Watts*, 256 N.C. at 618, 124 S.E.2d at 814; *Elliott v. Muehlbach*, 173 N.C. App. 709, 712, 620 S.E.2d 266, 269 (2005) (citing *Watts*, 256 N.C. at 618, 124 S.E.2d at 814); *see* NORTH CAROLINA LAW OF TORTS § 25.30 (3d ed. 2015). The plaintiff must also have a sufficient property interest to maintain a nuisance action. *Kent v. Humphries*, 303 N.C. 675, 678–79, 281 S.E.2d 43, 45–46 (1981) (holding that a plaintiff who had entered into an invalid lease and tendered rent which was accepted by the landlord had sufficient property interest in the rented property to maintain a nuisance action).

97. *Watts*, 256 N.C. at 616, 124 S.E.2d at 813; *Morgan*, 238 N.C. at 194, 77 S.E.2d at 689; *Parker v. Barefoot*, 130 N.C. App. 18, 21, 502 S.E.2d 42, 45 (1998) (“[A] defendant’s use of state-of-the-art technology in the operation of a facility or the fact that he was not negligent in the design or construction of that facility are not defenses to a nuisance claim.”), *rev’d, on other grounds*, 351 N.C. 40, 519 S.E.2d 315 (1999).

reasonable person.⁹⁸ The fact finder must consider all of the circumstances of a particular case and no single factor is determinative.⁹⁹ Furthermore, the alleged injury must be considered substantial and “affect the health, comfort or property of those who live near . . . [by causing] some substantial annoyance, some material physical discomfort, or injury to their health or property.”¹⁰⁰

In contrast to a private nuisance, a public nuisance constitutes an interference or invasion of rights common to the public, affecting the local community rather than the private use or enjoyment of one’s property.¹⁰¹ A plaintiff may pursue an action for a public nuisance

98. *Watts*, 256 N.C. at 618, 124 S.E.2d at 814 (citing RESTATEMENT OF TORTS (FIRST), § 826 cmt. a, b (AM. LAW INST. 1939)); see RESTATEMENT (SECOND) OF TORTS, § 826 cmt. c (AM. LAW INST. 1977). The North Carolina Court of Appeals has expounded upon this inquiry:

Reasonableness is a question of fact to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the conduct of the defendant. Determination of the gravity of the harm involves consideration of the extent and character of the harm to the plaintiff, the social value which the law attaches to the type of use which is invaded, the suitability of the locality for that use, the burden on plaintiff to minimize the harm, and other relevant considerations arising upon the evidence.

Rainey v. St. Lawrence Homes, Inc., 174 N.C. App. 611, 613, 621 S.E.2d 217, 220 (2005) (quoting *Pendergrast v. Aiken*, 293 N.C. 201, 217, 236 S.E.2d 787, 797 (1977)).

99. *Watts*, 256 N.C. at 618, 124 S.E.2d at 814 (noting broad range of relevant factors and stating that “[n]o single factor is decisive; all the circumstances in the particular case must be considered”). Note that while the Supreme Court of North Carolina in *Watts* employed the term “conduct” as noted above, the proper focus arguably remains on the nature of the invasion itself rather than the defendant’s conduct. See NORTH CAROLINA LAW OF TORTS § 25.30[1] (3d ed. 2015) (citing *Morgan*, 238 N.C. at 194, 77 S.E.2d at 689; PROSSER AND KEETON ON THE LAW OF TORTS § 87–88 (5th ed. 1984)).

100. *Watts*, 256 N.C. at 617, 124 S.E.2d at 813–14 (quoting *Pake v. Morris*, 230 N.C. 424, 426, 53 S.E.2d 300, 301 (1949)). Substantial injury must go beyond a “slight inconvenience or petty annoyance.” *Id.* at 619, 124 S.E.2d at 815. However, “if one makes an unreasonable use of his property and thereby causes another substantial harm in the use and enjoyment of his, the former is liable for the injury inflicted.” *Id.* at 619, 124 S.E.2d at 815 (citing RESTATEMENT (FIRST) OF TORTS, § 822 cmt. g, j (AM. LAW INST. 1939)).

101. *State v. Everhardt*, 203 N.C. 610, 618, 166 S.E. 738, 742 (1932). The Supreme Court of North Carolina has defined public nuisance in the following manner:

“To constitute a public nuisance, the condition of things must be such as injuriously affects the community at large, and not merely one or even a very few individuals. . . . Whatever tends to endanger life, or generate disease, and affect the health of the community; whatever shocks the public morals and sense of decency; whatever shocks the religious feelings of the community, or tends to its discomfort—is generally, at common law, a public nuisance, and a crime.”

Id. at 618, 166 S.E. at 742 (quoting WILLIAM L. CLARK, JR., HANDBOOK OF CRIMINAL LAW 398, 399 (William E. Mikell ed., 3d ed. 1915)). See NORTH CAROLINA LAW OF TORTS § 25.40 (3d ed. 2015).

only if he can establish special damages “differing in kind and degree from that suffered in common with the general public.”¹⁰²

Under a nuisance claim, a party may seek a remedy of temporary or permanent damages, as well as injunctive relief.¹⁰³ A temporary nuisance claim provides for damages solely related to past harm.¹⁰⁴ Alternatively, a permanent nuisance claim seeks damages for past, present, and future damages.¹⁰⁵ In addition, a party may seek abatement of an ongoing nuisance by injunction. Within the context of a private intentional nuisance, “[t]he degree of unreasonableness of the defendants’ conduct determines whether damages or permanent injunctive relief is the appropriate remedy.”¹⁰⁶ A court will only award injunctive relief in cases where the defendant’s conduct is found to be unreasonable based upon a finding that the gravity of the harm to the plaintiff outweighs the utility to the defendant.¹⁰⁷ However, a court may still award damages even if it does not order injunctive relief.¹⁰⁸

Dating back to the time of *William Aldred’s Case*, the application of nuisance law to agricultural facilities raises critical questions about how to balance the right to enjoy one’s property with the social utility

102. *Neuse River Found. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 116, 574 S.E.2d 48, 53 (2002) (holding that riparian waterfront owners and riverkeeper associations failed to establish special damages in public nuisance suit against hog producers, as “aesthetic and recreational interests alone” are insufficient to confer standing); *Hampton v. N.C. Pulp Co.*, 223 N.C. 535, 543–44, 27 S.E.2d 538, 543–44 (1943) (“[N]o individual may recover damages because of injury by public nuisance, unless he has received a special damage or unless the creator of the nuisance has thereby invaded some right which, upon principles of justice and public policy, cannot be considered merged in the general public right”); *McManus v. S. R. Co.*, 150 N.C. 537, 540, 64 S.E. 766, 768 (1909).

103. See NORTH CAROLINA LAW OF TORTS § 25.30[1][a] (3d ed. 2015).

104. See *id.*

105. See *Broadbent v. Allison*, 176 N.C. App. 359, 370, 626 S.E.2d 758, 766 (2006) (citing *Phillips v. Chesson*, 231 N.C. 566, 570, 58 S.E.2d 343, 347 (1950)) (“When permanent damages have been awarded, defendants have in effect been granted an easement to continue operations on their property in the same manner as previously conducted.”); NORTH CAROLINA LAW OF TORTS § 25.30[1][a] (3d ed. 2015). The award of permanent damages for a nuisance action will preclude any future recovery for a plaintiff based on the alleged nuisance in question. *Broadbent*, 176 N.C. App. at 370, 626 S.E.2d at 766.

106. *Mayes v. Tabor*, 77 N.C. App. 197, 200, 334 S.E.2d 489, 490 (1985) (citing *Pendergrast v. Aiken*, 293 N.C. 201, 217, 236 S.E.2d 787, 797 (1977)); NORTH CAROLINA LAW OF TORTS § 25.30[1][a] (3d ed. 2015).

107. *Mayes*, 77 N.C. App. at 200, 334 S.E.2d at 490 (citing *Pendergrast v. Aiken*, 293 N.C. 201, 217, 236 S.E.2d 787, 797 (1977)) (discussing the relevant test for determining whether injunctive relief is called for in the context of an agricultural nuisance suit against a neighboring hog farm).

108. *Id.*

of agricultural production.¹⁰⁹ North Carolina courts have recognized actionable claims under both theories of public and private nuisance resulting from interferences such as noise,¹¹⁰ smoke,¹¹¹ and odors.¹¹² Accordingly, the operation of an agricultural facility can give rise to an actionable nuisance claim.¹¹³

The spread of urban and residential development into traditionally agricultural communities poses unique challenges under common law nuisance, and raises concerns about the protection of existing farmland and agricultural facilities.¹¹⁴ The extension of urban development into agricultural communities implicates the common law doctrine of “coming to the nuisance.”¹¹⁵ This doctrine applies in cases where a plaintiff acquires or improves his land after the creation of the alleged nuisance.¹¹⁶ Under common law, a plaintiff is not automatically precluded from recovery by voluntarily “coming to the

109. The court in *William Aldred’s Case* succinctly laid out the underlying conflict between these two conflicting equities, contrasting the defendant’s claim of social utility that “the building of the house for hogs was necessary for the sustenance of man” with the right of enjoyment to one’s property. *William Aldred’s Case* (1611), 77 Eng. Rep. 816, 817; 9 Co. Rep. 57 b, 58 b; see Coquillette, *supra* note 4, at 775–77 (discussing the court’s treatment of the defendant’s argument based on social utility).

110. See, e.g., *Transcontinental Gas Pipe Line Corp. v. Gault*, 198 F.2d 196, 197–98 (4th Cir. 1952) (holding that noise and vibrations associated with the operation of a gas compressor station constituted a public nuisance under Maryland law); *Jones v. Queen City Speedways, Inc.*, 276 N.C. 231, 242–43, 172 S.E.2d 42, 50 (1970) (holding that noise from drag strip racing constituted a private nuisance); *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 618, 124 S.E.2d 809, 814 (1962) (holding that noise and vibrations from neighboring hosiery facility constituted an actionable nuisance); *Barrier v. Troutman*, 231 N.C. 47, 51, 55 S.E.2d 923, 926 (1949) (recognizing plaintiff entitled to injunctive relief from airport noise).

111. See, e.g., *Balt. & Potomac R.R. Co. v. Fifth Baptist Church*, 108 U.S. 317, 335 (1883) (affirming a church’s recovery of damages for a nuisance created by a railway facility’s noise, smoke, and odors); *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 194–95, 77 S.E.2d 682, 690 (1953) (recognizing actionable nuisance claim for neighboring landowners against oil refinery due to gases and odors emitted from the facility).

112. See, e.g., *Oates v. Algodon Mfg. Co.*, 217 N.C. 488, 489, 8 S.E.2d 605, 606 (1940) (recognizing damages for “any inconvenience and annoyance by way of odors suffered by him to his land”); *King v. Ward*, 207 N.C. 782, 783–84, 178 S.E. 577, 578–79 (1935) (affirming damages for loss of enjoyment caused by odors); *Mayes*, 77 N.C. App. at 199, 334 S.E.2d at 490 (recognizing actionable nuisance claim based on odor from neighboring hog farm).

113. See, e.g., *Mayes*, 77 N.C. App. at 199, 334 S.E.2d at 490 (discussing the operation of a hog farm as a nuisance).

114. See generally *Grossman & Fischer*, *supra* note 11, at 108–10 (discussing the early application of the coming to the nuisance defense in this context).

115. See, e.g., *Spur Indus., Inc. v. Del E. Webb Dev. Co.* 494 P.2d 701, 708 (Ariz. 1972) (describing nuisance action brought by a residential developer against a large cattle feedlot in a traditionally agricultural community).

116. See RESTATEMENT (SECOND) OF TORTS § 840D (AM. LAW INST. 1977).

nuisance.”¹¹⁷ However, the priority of use is only one of many factors that must be taken into account in determining whether the defendant’s use of the property is unreasonable.¹¹⁸ Courts have traditionally protected agricultural operations in rural areas when the neighbor bringing the suit “came to the nuisance.”¹¹⁹ Nevertheless, each court retains discretion to determine the relative weight of this factor on a case-by-case basis.¹²⁰ For this reason, many states, including North Carolina, have provided statutory protections to further insulate agricultural facilities from nuisance suits.

B. Enactment of the 1979 RTF Act in North Carolina

In response to concerns over the loss of farmland and agricultural development, states enacted “right-to-farm” laws to better protect agricultural operations from urban development. All fifty states currently have RTF laws;¹²¹ the large majority of which were first enacted between 1978 and 1983.¹²² RTF laws generally protect either agricultural operations from nuisance actions or prevent zoning and other restrictive local regulations from limiting agricultural activities.¹²³

In 1979, the North Carolina legislature enacted one of the first and most influential RTF laws in the country.¹²⁴ The statute’s

117. *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 618–19, 124 S.E.2d 809, 815 (1962). *See generally* NORTH CAROLINA LAW OF TORTS § 25.30 (3d ed. 2015) (supporting this approach). The Second Restatement notes that “[o]therwise the defendant by setting up an activity or a condition that results in the nuisance could condemn all the land in his vicinity to a servitude without paying any compensation, and so could arrogate to himself a good deal of the value of the adjoining land.” *Id.* § 840D cmt. b.

118. *Watts*, 256 N.C. at 619, 124 S.E.2d at 815.

119. *See, e.g.*, *Arbor Theatre Corp. v. Campbell Soup Co.*, 296 N.E.2d 11, 13–14 (Ill. App. Ct. 1973); *Dill v. Excel Packing Co.*, 331 P.2d 539, 548 (Kan. 1958). *But see* *Pendoley v. Ferreira*, 187 N.E.2d 142, 145 (Mass. 1963) (affirming actionable nuisance claim for residential community against preexisting hog farm). *See generally* Grossman & Fischer, *supra* note 11, at 108–11 (discussing the early application of the coming to the nuisance defense in this context). *Spur Industries v. Del Webb* provides a novel application of the coming to the nuisance defense within this context, recognizing a cognizable nuisance claim by a residential developer against a livestock facility, but requiring the developer to indemnify for the livestock owner for the costs of either moving or shutting down his facility. 494 P.2d 700, 708 (Ariz. 1972).

120. *See* Grossman & Fischer, *supra* note 11, at 108–10.

121. Harrison M. Pittman, *Validity, Construction, and Application of Right-to-Farm Acts*, in 8 AMERICAN LAW REPORTS 465, 480 (6th ed. 2005); Hamilton, *supra* note 73, at 103; *see* Reinert, *supra* note 16, at 1707.

122. Reinert, *supra* note 16, at 1707.

123. *See* Hamilton, *supra* note 73, at 104.

124. Grossman & Fischer, *supra* note 11, at 119; *see* Act of Mar. 26, 1979, ch. 202, 1979 N.C. Sess. Laws 140, 140–41 (codified as amended at N.C. GEN. STAT. §§ 106-700–01 (2015)); Neil D. Hamilton, *Right-to-Farm Laws*, in 13 NEIL E. HARL, AGRICULTURAL

“declaration of policy,” which has remained largely unchanged since its enactment, clearly states the law’s purpose.¹²⁵ In order to further “the declared policy of the State to conserve and protect and encourage the development and improvement of its agricultural land[,]” the Act has the stated purpose of “reduc[ing] the loss to the State of its agricultural and forestry resources by limiting the circumstances under which an agricultural or forestry operation may be deemed to be a nuisance.”¹²⁶ In essence, the law enables defendants to assert a “coming to the nuisance” defense for preexisting agricultural operations in lawsuits brought by plaintiffs using neighboring properties for non-agricultural uses.¹²⁷

As enacted, the statute provides an affirmative defense to nuisance liability¹²⁸ for preexisting agricultural and forestry operations.¹²⁹ An agricultural or forestry operation may raise this defense in a private or public nuisance action provided that: (1) the

LAW § 124.02 n.7 (2015); Reinert, *supra* note 16, at 1707 (noting original portion of the North Carolina RTF statute is generally considered the model “traditional” statute among states). At least nineteen states have patterned operative language on the original North Carolina statute, though some state statutes may still vary significantly. Grossman & Fischer, *supra* note 11, at 119–20.

125. See Act of July 8, 1992, ch. 892, sec. 1, § 106-700, 1991 N.C. Sess. Laws 441, 441–43 (codified as amended N.C. GEN. STAT. § 106-700 (2015)).

126. N.C. GEN. STAT. § 106-700 (2015).

127. See Grossman & Fischer, *supra* note 11, at 118.

128. See N.C. GEN. STAT. § 106-701(f)(2) (2015) (describing statutory protections as an “affirmative defense”); *Durham v. Britt*, 117 N.C. App. 250, 253, 451 S.E.2d 1, 2 (1994) (noting the defendant set forth the North Carolina RTF as an affirmative defense); *Answer to Amended Complaint* at 51, *Gillis v. Murphy-Brown, LLC*, No. 2:14-cv-000185-BR (E.D.N.C. Aug. 31, 2015), ECF no. 43 (listing the RTF act as an affirmative defense to liability). When interpreting similar RTF statutes, courts in other jurisdictions have found that because a state RTF provides an affirmative defense, the burden is on the proponent of the defense to prove the facts required to support it. See *Erbrich Prods. Co. v. Wills*, 509 N.E.2d 850, 858 (Ind. Ct. App. 1987) (holding that the defendant had burden to prove RTF defense, but the plaintiff had burden of proof for the exception for negligent operation under the Indiana RTF law); *Lima Twp. v. Bateson*, 838 N.W.2d 898, 906 (Mich. Ct. App. 2013) (holding the defendant raising the defense has the burden of proving by the preponderance of the evidence that the challenged conduct is protected under the Michigan RTF act).

129. Under the statute, “agricultural operation” was defined as “includ[ing], without limitation, any facility for the production for commercial purposes of crops, livestock, poultry, livestock products, or poultry products.” N.C. GEN. STAT. § 106-701(b) (2011). As amended, the statute also provides protections for “forestry operation[s],” which are defined as “those activities involved in the growing, managing, and harvesting of trees.” *Id.* § 701(b1); Act of July 8, 1992, ch. 892, sec. 1, § 106-700, 701(b1), 1991 N.C. Sess. Laws 441, 441–42 (codified as amended at N.C. GEN. STAT. § 106-700, 701(b1) (2015)); Act of July 18, 2013, ch. 314, sec. 1, § 106-701(b1), 2013 N.C. Sess. Laws 858, 859 (codified as amended at N.C. GEN. STAT. § 106-701 (b1) (2015)) (removing the phrase “but not sawmill operations” from § 106-701(b1)).

facility has been in operation for over one year and (2) the operation was not initially a nuisance.¹³⁰ The defendant has the burden of proof in raising this defense.¹³¹ However, the statute contains an exception that allows plaintiffs to recover damages when an operation causes water pollution or an overflow of water onto the plaintiff's property.¹³²

Even before the enactment of the 2013 amendments, North Carolina's RTF law offered agricultural operations broad protections from nuisance liability. The law exempted all types of preexisting agricultural activities from nuisance liability regardless of their nature or size, provided that the required statutory elements are met.¹³³ This type of general exemption represented one of the broadest right-to-farm protections available and has been adopted in at least fifteen other states.¹³⁴ In addition, the 1979 law further limited the regulation of such facilities through local zoning regulations, pre-empting all local ordinances that "would make the operation of any such agricultural or forestry operation or its appurtenances a nuisance or . . . abatement thereof as a nuisance."¹³⁵ These broad protections

130. N.C. GEN. STAT. § 106-701(a) (2015) ("No agricultural or forestry operation or any of its appurtenances shall be or become a nuisance, private or public, by any changed conditions in or about the locality outside of the operation after the operation has been in operation for more than one year, when such operation was not a nuisance at the time the operation began.").

131. *See Price v. Conley*, 21 N.C. App. 326, 328, 204 S.E.2d 178, 180 (1974) (holding that the burden of proof generally lies with the party raising an affirmative defense). However, a plaintiff may have the burden of demonstrating that the nuisance results from negligent operation of the facility to preclude the defendant from raising this defense. *See infra* notes 215–217 and accompanying text.

132. *See* N.C. GEN. STAT. § 106-701(c) (2015) ("The provisions of subsection (a) shall not affect or defeat the right of any person, firm, or corporation to recover damages for any injuries or damages sustained by him on account of any pollution of, or change in condition of, the waters of any stream or on the account of any overflow of lands of any such person, firm, or corporation."); Hamilton, *supra* note 73, § 124.02[2][g] (discussing the prevalence of such provisions in nuisance-related RTF laws).

133. *See* § 106-701(a)–(b); Hamilton, *supra* note 73, § 124.02[2] (describing the scope of these general exemptions within RTF acts from other states).

134. The following states have adopted similar general exemptions: Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Indiana, Kentucky, Maine, Maryland, Michigan, Mississippi, Oklahoma, South Carolina, and Washington. Hamilton, *supra* note 73, § 124.02[2]. Other states have incorporated other types of exemptions, including those related to livestock or agricultural facilities. *See generally id.* § 124.02[2] (noting a variety of possible exemptions).

135. N.C. GEN. STAT. § 106-701(d) (2015). *See* Hamilton, *supra* note 73, § 124.02[2]. Alabama, Arkansas, Connecticut, Idaho, Kentucky, New Mexico, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, and Virginia have enacted either identical or similar provisions in their right-to-farm laws. *Id.* Note that as a result of the 1997 Amendments, a county may adopt limited zoning regulations for large swine facilities of approximately 4,000 hogs or more. Aaron M. McKown, Note, *Hog*

provided neighboring communities with limited measures for regulating operation of these facilities.

While the breadth of the protections afforded to agricultural facilities under the law has been widely criticized,¹³⁶ the underlying justifications for the RTF law are not without merit. The promotion of agriculture and preservation of farmland not only protects a vital sector of North Carolina's economy,¹³⁷ but may also prevent urban sprawl and promote a healthy environment.¹³⁸ The loss of farms and farmland remains a serious issue in North Carolina. Between 2002 and 2012, North Carolina lost over 650,000 acres of farmland and thousands of farms.¹³⁹ As a result of the industrialization of farming practices across the nation, only two percent of Americans are directly involved in agricultural production today.¹⁴⁰ These changes in both the physical and social landscape of the countryside have placed agricultural practices under much greater scrutiny.¹⁴¹

In the face of the changing landscape of rural North Carolina, the protections in place under the RTF law arguably have the potential to help farmers avoid costly litigation and efficiently resolve conflicts between neighboring landowners.¹⁴² Given the capital investment required for farming operations, the litigation of a nuisance dispute may threaten the continued viability of a farming operation.¹⁴³ Conversely, farmers may be less sensitive to the impacts of their operations on surrounding communities due to the perceived

Farms and Nuisance Law in Parker v. Barefoot: Has North Carolina Become a Hog Heaven and Waste Lagoon?, 77 N.C. L. REV. 2355, 2367 & n.94 (1999) (citing N.C. GEN. STAT. § 153A-340(b)(3) (1997)) (discussing the 1997 amendment and the 4,000 hog approximation based on 600,000 pound steady live weight limit provided in statute).

136. See, e.g., Reinert, *supra* note 16, at 1738.

137. "North Carolina's agricultural industry contributes . . . \$78 billion to the state's economy, accounts for more than 17 percent of the state's income, and employs 16 percent of the workforce." *North Carolina Agriculture Overview*, N.C. DEPT' AGRIC. & CONSUMER SERVS., <http://www.ncagr.gov/stats/general/overview.htm> [https://perma.cc/24XB-PXR5].

138. See Grossman & Fischer, *supra* note 11, at 100.

139. *North Carolina Continues to Lose Farms, but Rate of Land Loss Slows*, SOUTHEAST FARM PRESS (Apr. 1, 2014), <http://southeastfarmpress.com/miscellaneous/north-carolina-continues-lose-farms-rate-land-loss-slows> [https://perma.cc/P4L8-8EN8].

140. Terence J. Centner, *Governments and Unconstitutional Takings: When do Right-To-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87, 90 (2006).

141. See *id.* at 91–93 (discussing the change in the political landscape and resulting scrutiny on agricultural practices in the United States).

142. See Jacqui Fatka, *What Right-to-Farm Laws do for Farmers*, FARM FUTURES (Apr. 3, 2015), http://farmfutures.com/story-right-farm-laws-farmers-17-125832-spx_1 [https://perma.cc/T2CV-HB3N].

143. See Grossman & Fischer, *supra* note 11, at 100 (discussing relevant factors in a farmer's decision to continue farming on a particular piece of land).

protections afforded to agricultural operations under RTF laws.¹⁴⁴ For this reason, commentators have criticized RTF laws as being overly protective of agricultural facilities to the detriment of the surrounding communities.¹⁴⁵ The following review of the existing case law regarding North Carolina's RTF law prior to the 2013 amendments will provide insight into these concerns and the potential implications of the newly amended law.

C. *Judicial Interpretation of the 1979 RTF Act*

Following the enactment of the RTF law in 1979, the North Carolina Court of Appeals has recognized certain limitations on the availability of statutory protections under the RTF law consistent with the doctrine of "coming to the nuisance." While acknowledging "[i]t is the public policy of North Carolina to encourage farming, farmers, and farmlands,"¹⁴⁶ the court of appeals has interpreted the original RTF law to provide an affirmative defense only in cases where the agricultural operation preceded the plaintiff's non-agricultural use¹⁴⁷ and the character of the operation did not undergo a fundamental change.¹⁴⁸ As interpreted by the courts, these limitations helped to preserve equitable relief for plaintiffs who did not fall within intended scope of the law.¹⁴⁹

The North Carolina Court of Appeals has interpreted the statute to provide a codification of the "coming to the nuisance" defense, limiting the availability of its protections to preexisting agricultural operations. In *Mayes v. Tabor*,¹⁵⁰ a private summer camp brought a nuisance suit against a neighboring hog farm. The summer camp had been in operation for over sixty years and its current owners preceded the operation of the hog farm.¹⁵¹ The defendant had been operating the hog farm for well over one year prior to the commencement of

144. Duke & Malcolm, *supra* note 18, at 298–99; *id.* at 100–01.

145. See, e.g., Reinert, *supra* note 16, at 1738.

146. *Durham v. Britt*, 117 N.C. App. 250, 253, 451 S.E.2d 1, 3 (1994) (citing *Baucom's Nursery Co. v. Mecklenburg Cty.*, 62 N.C. App. 396, 398, 303 S.E.2d 236, 238 (1983)); *Baucom's Nursery Co.* 62 N.C. App. at 398, 303 S.E.2d at 238 (citing N.C. GEN. STAT. §§ 106-550, 139-2, 700, 583 (1983)).

147. See *Mayes v. Tabor*, 77 N.C. App. 197, 201, 334 S.E.2d 489, 491 (1985).

148. See *Durham*, 117 N.C. App. at 254–55, 451 S.E.2d at 3–4.

149. See *infra* note 172 and accompanying text.

150. 77 N.C. App. 197, 334 S.E.2d 489 (1985).

151. *Id.* at 198, 334 S.E.2d at 489. The summer camp had been in operation for approximately sixty years. The plaintiffs purchased the summer camp nineteen years before the commencement of trial. The defendant bought the property fifteen years prior to the action and began raising 300–500 hogs on the property. *Id.* at 198, 334 S.E.2d at 490.

the nuisance action¹⁵² and moved for summary judgment on the basis that the nuisance action was barred under the RTF Act.¹⁵³

In affirming the trial court's denial of summary judgment for the defendant, the North Carolina Court of Appeals held that the plaintiff was not precluded from bringing a nuisance action due to any "changed circumstances in or about the locality" as this phrase is intended by the statute.¹⁵⁴ Noting that "[t]his is not a case in which the non-agricultural use extended into an agricultural area," the court implicitly rejected the view that the one-year requirement within the statute should be read as a statute of repose defining a limited time period in which a nuisance suit may be brought.¹⁵⁵ Consistent with the interpretation of similar RTF statutes in other states,¹⁵⁶ the court interpreted the statute to condition the affirmative defense on a finding that the defendant's operation preceded the plaintiff's non-agricultural use.¹⁵⁷

Similarly, agricultural operations that underwent a "fundamental change" received only limited protections under the 1979 law.¹⁵⁸ In *Durham v. Britt*,¹⁵⁹ a residential developer purchased property

152. See *id.* at 198, 334 S.E.2d at 490 (noting the defendant purchased his property fifteen years prior to the commencement of the action and began raising hogs there); Statement of the Evidence at 27, *Mayes v. Tabor*, 77 N.C. App. 197, 334 S.E.2d 489 (1985) (No. 8429SC1230) (noting the defendant operated a hog farm for at least ten years) (on file with the *North Carolina Law Review*).

153. *Mayes*, 77 N.C. App. at 198, 334 S.E.2d at 490.

154. *Id.* at 201, 334 S.E.2d at 491 (quoting N.C. GEN. STAT. § 106-701(a) (1983)).

155. *Id.* In *Mayes*, the defendant was operating a hog farm for well over one year prior to the commencement of the nuisance action. See *id.* at 198, 334 S.E.2d at 490 (noting the defendant purchased his property fifteen years prior to the commencement of the action and began raising hogs there); Statement of the Evidence at 27, *Mayes v. Tabor*, 77 N.C. App. 197, 334 S.E.2d 489 (1985) (No. 8429SC1230) (noting the defendant operated a hog farm for at least ten years).

156. See *Herrin v. Opatut*, 281 S.E.2d 575, 579 (Ga. 1981); *Payne v. Skaar*, 900 P.2d 1352, 1355 (Idaho 1995); *Laux v. Chopin Land Assocs.*, 550 N.E.2d 100, 102 (Ind. Ct. App. 1990). But see *Steffens v. Keeler*, 503 N.W.2d 675, 677-78 (Mich. Ct. App. 1993) (holding that even though plaintiff first inhabited neighboring property, the defendant's hog farm not subject to private nuisance suit because the farm was operated in conformity with generally accepted agricultural practices, and the use of area within one mile radius of defendant's property had not sufficiently changed before defendants started hog operation); *Holubec v. Brandenberger*, 111 S.W.3d 32, 37-38 (Tex. 2003) (holding that one-year limitation in Texas RTF law represented a statute of repose, providing absolute immunity to a non-negligent agricultural operation that had been in operation for over a year).

157. *Mayes*, 77 N.C. App. at 201, 334 S.E.2d at 491 ("This is not a case in which the non-agricultural use extended into an agricultural area. Camp Deerwoode has been in existence for sixty years.").

158. *Durham v. Britt*, 117 N.C. App. 250, 254-55, 451 S.E.2d 1, 3-4 (1994).

159. 117 N.C. App. 250, 451 S.E.2d 1 (1994).

located next to an existing turkey farm that had operated for several years.¹⁶⁰ Following the plaintiff's purchase of the property, the neighboring farm owner sought to convert his operation into an industrial hog facility.¹⁶¹ The plaintiff brought a nuisance action against the property owner prior to the commencement of the hog farming operation and the trial court granted the defendant's motion for summary judgment on the basis that the nuisance claim is barred under the RTF law.¹⁶²

In reversing the trial court, the North Carolina Court of Appeals stated "we do not believe the legislature intended [the North Carolina RTF statute] to cover situations in which a party *fundamentally changes* the nature of the agricultural activity which had theretofore been covered under the statute."¹⁶³ While noting that "a fundamental change could consist of a significant change in the *type* of agricultural operation, or a significant change in the *hours* of the agricultural operation,"¹⁶⁴ the court held that "[c]ertainly, in the instant case, a fundamental change has occurred where defendant, who previously operated turkey houses, has decided to change his farming operation to that of a hog production facility."¹⁶⁵ The *Durham* court reasoned that the "plaintiff did not 'come to the nuisance,' but rather, defendant Britt '*imposed the nuisance upon plaintiff*' because 'no nuisance existed until defendant Britt fundamentally changed the nature of the agricultural activity occurring on his property by constructing a high volume commercial swine facility.'"¹⁶⁶

Contrasting the operation of "turkey houses" with that of a "hog production facility," the *Durham* court drew a distinction between the

160. *Id.* at 251, 451 S.E.2d at 1. The defendant operated four turkey houses at the time of the trial. *Id.*

161. *Id.* at 251, 451 S.E.2d at 1–2.

162. *Id.* at 252–53, 451 S.E.2d at 2.

163. *Id.* at 254–55, 451 S.E.2d at 3 (emphasis added).

164. *Id.* (emphasis added) (citing IND. CODE. § 34-1-52-4 (1986)) (comparing the North Carolina RTF statute to Indiana RTF statute).

165. *Id.* at 254, 451 S.E.2d at 4. While not expressly clarified by the *Durham* court, the finding of a "fundamental change" would most likely result in the resetting of the one-year statute of repose within the statute. See *Laux v. Chopin Land Assocs.*, 550 N.E.2d 100, 102 (Ind. Ct. App. 1990) (interpreting a similar Indiana RTF statute and explaining the effect of finding of a significant change).

166. *Durham*, 117 N.C. App. at 254, 451 S.E.2d at 3 (emphasis added) (quoting plaintiff's brief). The alternative, as alluded to in the opinion, would be that after "conduct[ing] an agricultural operation on his property for a period in excess of one year, thereafter [a person] may conduct any agricultural activity regardless of its scope and impact on surrounding neighbors, and the neighbors may not be heard to complain." *Id.* (emphasis in original) (quoting plaintiff's brief).

two types of farming operations.¹⁶⁷ In this sense, the court's exclusive use of the phrase "hog production facility" rather than "hog farm" is revealing because it distinguishes traditional farming practices from those of industrial agriculture.¹⁶⁸ The limitations imposed by the North Carolina Court of Appeals advanced the argument that such facilities should not receive the same protection under the statute.¹⁶⁹ The Supreme Court of North Carolina declined to hear the appeal of the reversal.¹⁷⁰ North Carolina's treatment of such cases is consistent with other state courts, which have similarly found that a significant change in operation precludes the availability of an affirmative defense when interpreting comparable RTF laws.¹⁷¹

In many ways, this interpretation of the statute resembles the balancing of equitable considerations in common law, helping to ensure that the application of nuisance immunity under the law does not overstep its intended purpose.¹⁷² However, the 2013 amendments to the RTF law severely curtail the prior statutory interpretation by the North Carolina Court of Appeals, raising serious doubts about the equitable relief available to plaintiffs under these circumstances.

167. *Durham*, 117 N.C. App. at 254, 451 S.E.2d at 3; see Burns, *supra* note 41, at 881 n.241.

168. *Durham*, 117 N.C. App. at 254, 451 S.E.2d at 3–4; see Burns, *supra* note 41, at 881 n.241 (noting the court's use of the term "hog production facility" in its opinion).

169. See Burns, *supra* note 41, at 881.

170. *Durham v. Britt*, 340 N.C. 260, 456 S.E.2d 828 (1995).

171. See *Payne v. Skaar*, 900 P.2d 1352, 1355 (Idaho 1995) ("The district court correctly concluded the RTFA does not wholly prevent a finding of nuisance in circumstances of an expanding agricultural operation surrounded by an area that has remained substantially unchanged."); *Jerome Twp. v. Melchi*, 457 N.W.2d 52, 55 (Mich. Ct. App. 1990) (holding that a change from a strawberry farm to an apiary precluded a nuisance defense under the Michigan RTF act). In *Payne v. Skaar*, the Idaho Supreme Court affirmed the district court's holding that the expansion of a feedlot from approximately 1,000–2,500 head of cattle to 3,200–4,900 head of cattle constituted a significant change that precluded a defense under the RTF statute. *Payne*, 900 P.2d at 1353–54. The court emphasized the fact that the surrounding area remained substantially unchanged and some of the citizens involved in the suit predated the feedlot. *Id.* at 1355. On the other hand, some courts have held that an expansion or change in operation does not render the RTF act inapplicable. *But see Laux v. Chopin Land Assocs.*, 550 N.E.2d 100, 102–03 (Ind. Ct. App. 1990) (holding that a change from grain farming to hog farming constituted a significant change, but an expansion of the hog facility from 29 hogs to between 200–300 hogs did not preclude a nuisance defense under the Indiana RTF law); *Steffens v. Keeler*, 503 N.W.2d 675, 677–78 (Mich. Ct. App. 1993) (holding that pig farm could raise an affirmative defense under the Michigan RTF Act even when it did not precede the plaintiff landowner because there was insufficient evidence that the area surrounding the farm had changed to a predominantly residential area).

172. See Zboreak, *supra* note 36, at 170.

III. ENACTMENT AND POTENTIAL INTERPRETATIONS OF THE 2013 AMENDMENTS TO THE NORTH CAROLINA RTF ACT

Over fifteen years after *Durham v. Britt*, the North Carolina General Assembly significantly amended the RTF law to expand the scope of statutory protections afforded to agricultural and forestry operations from nuisance suits.¹⁷³ The passage of this legislation is better understood if viewed in conjunction with growing number of agricultural nuisance suits being filed in North Carolina and several other states.¹⁷⁴ As of this writing, the North Carolina Court of Appeals has not yet had the opportunity to interpret the RTF law as amended. This Section will explore the underlying motivations behind the law—as well as potential statutory interpretations of the amended RTF law—by drawing from the interpretations of similar provisions in other states.

A. Growing Trend in Agricultural Nuisance Suits and Legislative Proposals

Despite the statutory protections from nuisance suits afforded to agricultural operations under RTF laws across the country, plaintiffs have brought successful nuisance actions against industrial agricultural facilities.¹⁷⁵ Neighboring landowners have successfully halted the construction of industrial hog farms by obtaining injunctions under the theory of anticipatory nuisance.¹⁷⁶ Plaintiffs have also won multiple high-profile nuisance lawsuits against industrial pork producers for the operation of existing facilities.¹⁷⁷ In

173. See *infra* Section III.B.

174. See *infra* Section III.A.

175. See, e.g., Fatka, *supra* note 142 (noting recent nuisance suit in Indiana as well as other pending cases in California, Illinois, and Pennsylvania); Bridget Huber, *Law and Odor: How to Take Down a Terrible-Smelling Hog Farm*, MOTHER JONES (May 21, 2014 5:00 AM), <http://www.motherjones.com/environment/2014/04/terrible-smell-hog-farms-lawsuits> [https://perma.cc/K3P5-338X].

176. See *Superior Farm Mgmt. v. Montgomery*, 513 S.E.2d 215, 217 (Ga. 1999); Terence J. Centner, *Agricultural Nuisances: Qualifying Legislative “Right-to-Farm” Protection Through Qualifying Management Practices*, 19 LAND USE POL’Y 259, 261 (2002).

177. See, e.g., *Hanes v. Cont’l Grain Co.*, 58 S.W.3d 1, 2, 5 (Mo. Ct. App. 2001) (affirming jury verdict in favor of plaintiff’s temporary nuisance claim against hog producer and award of \$100,000 to fifty-two of the plaintiffs); Huber, *supra* note 175 (noting the success of two plaintiff’s lawyers in securing over \$32 million in jury verdicts as well as millions of dollars in settlements for nuisance suits brought against hog producers); Mark Koba, *\$20 Million Fight Threatened Over Pig Smell on Farm*, NBC NEWS (May 9, 2014, 3:50 PM), <http://www.nbcnews.com/business/business-news/20-million-fight-threatened-over-pig-smell-farm-n101751> [https://perma.cc/WJ2W-8AHA] (noting that a \$20 million lawsuit is threatened against pork producer).

2010, a jury awarded seven Missouri plaintiffs an \$11 million judgment in a nuisance suit against Premium Standard Farms, Inc., a subsidiary of Smithfield Foods.¹⁷⁸ After the jury verdict was announced, Premium Standard Farms threatened to leave the state.¹⁷⁹

In 2013, hundreds of plaintiffs brought nuisance claims against hog producer Murphy-Brown, LLC, a subsidiary of Smithfield Foods,¹⁸⁰ arising from Murphy-Brown's operation of industrial hog facilities in North Carolina.¹⁸¹ As of this writing, there are currently twenty-six lawsuits related to these nuisance actions pending in the United States District Court for the Eastern District of North Carolina.¹⁸² According to the complaints, many plaintiffs are longtime—if not lifelong—area residents,¹⁸³ some of whom can trace back their family's ownership of their current properties over a century or more.¹⁸⁴ The complaints illustrate the plight of residents living near these facilities:

Plaintiffs have suffered episodes of noxious and sickening odor, onslaughts of flies and pests, nausea, burning and watery eyes,

178. *Owens v. ContiGroup Cos.*, 344 S.W.3d 717, 721 (Mont. Ct. App. 2011) (affirming verdict and rejecting defendant's claim that damages were excessive). See Ryan Davis, *Mo. Looks to Rein in Farm Odor Nuisance Suits*, LAW360, (Mar. 31, 2011, 8:06 PM) <http://www.law360.com/articles/229224/mo-looks-to-rein-in-farm-odor-nuisance-suits> [https://perma.cc/GW3U-AXQK].

179. Following the jury verdict, Premium Standard Farms issued a press release stating that “[i]n light of this decision and in view of the continuing hostile environment toward live hog production, we have serious concerns whether we will ever make any future investments in the state of Missouri.” Press Release, Premium Standard Farms, LLC, *Premium Standard Farms to Appeal Missouri Verdict*, BUSINESS WIRE (Mar. 4, 2010), <http://www.businesswire.com/news/home/20100304006726/en/Premium-Standard-Farms-Appeal-Missouri-Verdict#.Uz78XmTrVkC> [https://perma.cc/6WN7-KUNU]; see Davis, *supra* note 178.

180. See Michaels, *supra* note 27; *NC Hog Farm Factory Litigation*, WALLACE & GRAHAM, P.A., <http://myhogfarmcase.com/> [https://perma.cc/6Y74-8AX3]. While nuisance claims were initially filed back in July of 2013, those claims were withdrawn and new claims were filed in 2014 under the direction of the law firm Wallace & Graham. See *supra* notes 26–32 and accompanying text.

181. See *supra* note 26–32 and accompanying text.

182. *NC Hog Farm Factory Litigation*, *supra* note 180.

183. See, e.g., Amended Complaint at 7, 10, 12, 14, 17, *Gillis v. Murphy-Brown, LLC*, No. 7:14-CV-00185-BR, (E.D.N.C. July 31, 2015) ECF No. 42 (noting plaintiff Annjeanette Gillis was a lifelong resident; plaintiff Gwendolyn Pickett was a lifelong resident; plaintiff Allen T. Johnson has lived there his whole life except for two years; plaintiff Elsie Darlene Maynor was a lifelong resident of the community, who has resided at her current residence for twenty-three years; and plaintiff William Murphy and his family have lived at their current residence for many years).

184. See, e.g., *id.* at 7. One of the plaintiffs, Annjeanette Gillis, is an African American woman who has lived on her family's homestead since she was born in 1949. *Id.* The complaint notes that her family's claim to the land dates back over a century to the Reconstruction era. *Id.*

stress, anger, worry, loss of property value, loss of use and enjoyment of their property, inability to comfortably engage in outdoor activities, cookouts, gardening, lawn chores, drifting of odorous mist and spray onto their land, inability to keep windows and doors open, difficulty breathing and numerous other harms.¹⁸⁵

The plaintiffs alleged private temporary nuisance¹⁸⁶ and negligence claims,¹⁸⁷ requesting both compensatory and punitive damages.¹⁸⁸ The defendant, Murphy-Brown, LLC, raised the affirmative defense that the plaintiffs' claims are barred, in whole or in part, by the RTF law. In support of its defense, Murphy-Brown alleged that "the farm[s] at issue began operations more than one year before Plaintiffs' alleged causes of action arose and that operations at that farm were reasonable and not a nuisance at the time they began."¹⁸⁹ This ongoing nuisance litigation served as a catalyst for the 2013 amendments to the North Carolina RTF law.¹⁹⁰

In response to the increasing number of agricultural nuisance lawsuits over the past two decades, many states, including North Carolina, have expanded protections for agricultural facilities from nuisance actions.¹⁹¹ Following the \$11 million jury verdict for the plaintiffs in the case against Premium Standard Farms, the Missouri legislature passed a law prohibiting multiple lawsuits against the same farm under the theory of temporary nuisance and limiting the availability of damages in both temporary and permanent nuisance

185. *Id.* at 6.

186. *Id.* at 58–60. The Plaintiffs claim that their "right to use and enjoy their properties has been impaired by recurring foul and offensive odors; hog manure and urine; flies or other insects; buzzards or other scavenger animals; vectors of disease; trucks cause noise and lights at night and foul smells; dead hogs; and other sources of nuisance." *Id.* at 58. The complaint alleges that "[t]he nuisance caused by Defendant's swine has substantially impaired Plaintiffs' and [sic] use and enjoyment of their property, and has caused anger, embarrassment, discomfort, annoyance, inconvenience, decreased quality of life, deprivation of opportunity to continue to develop properties, injury to and diminished value of properties, physical and mental discomfort and reasonable fear of disease and adverse health effects." *Id.*

187. *Id.* at 60–61.

188. *Id.* at 62. The plaintiffs asserted that the defendant is vicariously liable for the actions of its contract growers in the state, and otherwise liable under an "integrator liability" theory. *Id.* at 50.

189. Defendant's Answer at 51, *Gillis v. Murphy-Brown, LLC*, No. 7:14-CV-00185-BR (E.D.N.C. Aug. 31, 2015), ECF No. 43.

190. See *infra* notes 206–207 and accompanying text.

191. See Bennett, *supra* note 14.

actions.¹⁹² Other states have even amended their state constitutions to incorporate a constitutional “right to farm.”¹⁹³

In addition, many states have strengthened protections for agricultural facilities through amendments to their RTF laws.¹⁹⁴ In recognition of this trend, the American Legislative Exchange Council (“ALEC”), a conservative think tank, released its own model Right-to-Farm Act in 1996.¹⁹⁵ ALEC’s model RTF law provides extensive protections for agricultural operations from nuisance suits.¹⁹⁶ The model bill broadly defines “agricultural operations” and significantly limits the circumstances under which changes at an agricultural facility would expose it to nuisance liability.¹⁹⁷ In addition, the model

192. Brent Martin, *Gov. Nixon Signs Farm Nuisance Lawsuit Bill, After Vetoing Initial Bill*, MISSOURINET (May 11, 2011), <http://www.missourinet.com/2011/05/11/gov-nixon-signs-farm-nuisance-lawsuit-bill-after-vetoing-initial-bill-audio/> [<https://perma.cc/8WGV-8WDW>]; *Missouri Jury Awards Residents \$11 Million in Damages from Living Under Cloud of Stench Caused by Industrial Hog Farms*, PR NEWswire (Mar. 5, 2010, 1:58 PM), <http://www.prnewswire.com/news-releases/missouri-jury-awards-residents-11-million-in-damages-from-living-under-cloud-of-stench-caused-by-industrial-hog-farms-86643287.html> [<https://perma.cc/QP8Y-KNPZ>]; see MO. REV. STAT. § 537.296 (2015).

193. North Dakota and Missouri have both amended their state constitutions to include a right-to-farm, while Oklahoma and Indiana have unsuccessfully attempted to do so. See Ross H. Pifer, *Right to Farm Statutes and the Changing State of Modern Agriculture*, 46 CREIGHTON L. REV. 707, 715–717 (discussing North Dakota Constitutional Amendment); Zborek, *supra* note 36, at n.173 (discussing North Dakota and Missouri amendments and attempted constitutional amendment in Indiana); Brook Jarvis, *A Constitutional Right to Industrial Farming?*, BLOOMBERG NEWS (Jan. 9, 2014), <http://www.bloomberg.com/bw/articles/2014-01-09/industrial-farming-state-constitutional-amendments-may-give-legal-shield> [<https://perma.cc/Z8UK-5UL7>]. In 2012, North Dakota amended its constitution to provide constitutional protections for “the right of farmers and ranchers to employ agricultural technology, modern livestock production, and ranching practices.” N.D. CONST. art. XI, § 29 (amended 2012). In 2014, Missouri successfully amended its constitution to incorporate a “right of farmers and ranchers to engage in farming and ranching practices[.]” MO. CONST. art. I, § 35 (amended 2014). These amendments have been sharply criticized as “a concerted effort to shield factory farms and concentrated agricultural feeding operations from regulations to protect livestock, consumers and the environment.” *Vote ‘no’ on Missouri ‘Right to Farm’ Amendment in August*, KANSAS CITY STAR (June 23 2014 4:43 PM), <http://www.kansascity.com/opinion/editorials/article603633.html#storylink=cpy> [<https://perma.cc/K9PU-HHYV>].

194. See Hamilton, *supra* note 1, at 577–78 (describing the extension of “right to farm” protection to facilities that met regulatory requirements); David Bennett, *supra* note 14 (explaining how several states have passed legislation to protect “modern farming rights”).

195. *Right to Farm Act*, AM. LEGIS. EXCH. COUNCIL, <http://www.alec.org/model-policy/right-to-farm-act/> [<https://perma.cc/YJZ7-HCAC>].

196. *Id.* See generally Zborek, *supra* note 36, at 171–76 (discussing ALEC’s model RTF legislation).

197. *Right to Farm Act*, *supra* note 195. In particular, the model bill states that:

bill contains a provision that allows an agricultural operation to recover attorneys' fees from a plaintiff following an unsuccessful nuisance suit.¹⁹⁸ Several states have incorporated similar language into their RTF laws.¹⁹⁹

Beginning in 1992, the North Carolina General Assembly took additional steps to limit a plaintiff's ability to bring a nuisance action against a neighboring agricultural facility. The legislature first extended nuisance protections to forestry operations in 1992.²⁰⁰ In 1995, North Carolina enacted legislation requiring pre-trial mediation for all farm nuisance disputes.²⁰¹ The failure of a party to engage in mediation prior to bringing a nuisance action could result in the

A farm or farm operation is in accordance with subsection one of section two and shall not be found to be a public or private nuisance as a result of any of the following:

1. A change in ownership or size.
2. Temporary cessation or interruption of farming.
3. Enrollment in government programs.
4. Adoption of new technology.
5. A change in the type of farm product being produced.

Id.

198. *Id.* The ALEC model act provides that "[i]n any nuisance action brought in which a farm or farm operation is alleged to be a nuisance, if the defendant farm or farm operation prevails, the farm or farm operation may recover from the plaintiff the actual amount of costs and expenses determined by the court to have been reasonable [sic] incurred by the farm or farm operation in connection with the defense of the action, together with reasonable and actual attorneys' fees." *Id.*

199. See, e.g., Act of April 13, 2005, No. 2257, sec. 5, § 2-4-107, 2005 Ark. Acts 9681, 9683-84 (codified as amended at ARK. CODE. ANN. § 2-4-107 (2015)) (incorporating substantially similar language regarding circumstances under which farms will not be found a nuisance); Act of June 20, 1995, No. 94, § 286.473, 1995 Mich. Pub. Acts. 1065, 1066-68 (codified as amended at MICH. COMP. LAWS § 286.473 (2015))(using almost verbatim language regarding circumstances under which farms will not be found a nuisance and attorney fees); Act of May 11, 2009, ch. 147, sec. 1, 2009 Okla. Sess. Laws 508, 509 (codified as amended at OKLA. STAT. tit. 50, § 1.1 (2015))(inserted fee-shifting provision and statute of repose).

200. Act of July 8, 1992, ch. 892, sec. 1, § 106-700, 1991 N.C. Sess. Laws 441, 441-43 (codified as amended at N.C. GEN. STAT. § 106-700 (2015)).

201. Act of July 27, 1995, ch. 500, sec. 1, § 7A-38.3, 1995 N.C. Sess. Laws 1489, 1492-94 (codified as amended at N.C. GEN. STAT. § 7A-38.3 (2015)). See *Powell v. Bulluck*, 155 N.C. App. 613, 615-17, 573 S.E.2d 699, 701-02 (2002) (discussing the statutory requirements and clarifying that "[t]he statute does not require that all interested parties, who may later become plaintiffs, join in the request for mediation"). The stated purpose of requiring mediated settlement conferences is "to facilitate the settlement of superior court civil actions and to make civil litigation more economical, efficient, and satisfactory to litigants and the State." N.C. GEN. STAT. § 7A-38.1 (2015). Note that the 2013 amendment further amended the tolling provision of the statute to provide that "[t]he filing of a request for prelitigation mediation under subsection (d) of this section does not constitute the commencement or the bringing of an action involving a farm nuisance dispute." N.C. GEN. STAT. § 7A-38.3(h) (2015).

dismissal of the case.²⁰² The protections afforded to agricultural facilities were substantially broadened following the 2013 amendments to the RTF law.

B. The 2013 Amendments to the North Carolina RTF Law

On July 17, 2013, the North Carolina General Assembly amended the state's RTF law to further limit the remedies available to neighboring landowners in agricultural nuisance actions, extending protections to agricultural and forestry operations well beyond the scope of the original law.²⁰³ The amendments closely resembled language contained in the model bill proposed by ALEC,²⁰⁴ as well as the amended RTF statute in Indiana.²⁰⁵ The North Carolina legislature amended the RTF law only weeks after plaintiffs filed hundreds of nuisance suits against Murphy-Brown arising from its operation of industrial hog facilities.²⁰⁶ A comparison of the legislative history and the timeline of the litigation strongly suggests that the proposed amendments were modified to apply to the developing litigation.²⁰⁷ After Governor McCrory signed the amendments into law on July 18, 2013, the law went into effect

202. § 7A-38.3(c) (potentially serving as a barrier to plaintiffs in agricultural nuisance suits).

203. Act of July 18, 2013, ch. 314, sec. 1, § 106-701, 2013 N.C. Sess. Laws 858, 859 (codified as amended at N.C. GEN. STAT. § 106-701 (2015)). The Act was entitled "An Act to Provide that Agricultural and Forestry Operations Are Not Nuisances Under Certain Circumstances and to Provide for the Award of Costs and Attorneys' Fees." *Id.*

204. See *Right to Farm Act*, *supra* note 195; Zborek, *supra* note 36, at 175 (discussing the fee-shifting provision in the ALEC model RTF).

205. IND. CODE ANN. § 32-30-6-9.5 (West 2015).

206. See Michaels, *supra* note 27 (noting the Wake County court received close to 600 complaints during the first week of July).

207. On July 3, 2013, the plaintiffs involved in the nuisance litigation began to file and serve prelitigation farm nuisance mediation demands. See, e.g., Request for Prelitigation Mediation of Farm Nuisance Dispute, No. 13-R-685 Blanks v. Smithfield Foods, Inc., (N.C. Super. Ct. July 3, 2013) (on file with the *North Carolina Law Review*). On July 17, 2013, the North Carolina General Assembly passed a significantly amended version of the bill. See H.R. 614, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013) (Proposed Conference Comm. Substitute H614-PCCS80415-TQ-3, July 16, 2013). This final version of the bill, as enacted, incorporated a new section to stating that "[t]he filing of a request for prelitigation mediation under subsection (d) of this section does not constitute the commencement or the bringing of an action involving a farm nuisance dispute." Act of July 18, 2013, ch. 314, sec. 2, § 7A-38.3(h) 2013 N.C. Sess. Laws at 859 (codified as amended N.C. GEN. STAT. § 7A-38.3(h) (2015)). Prior versions of the amendment provided that the bill would become effective on October 1, 2013. See, e.g., H.R. 614, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013) (as adopted in S. Comm. on Agric., Env't, & Nat. Res. June 11, 2013). However, the final version was altered to state that "[t]his act is effective when it becomes law and applies to actions commenced or brought on or after that date." Act of July 18, 2013, ch. 314, sec. 3, 2013 N.C. Sess. Laws at 859.

immediately, applying to all actions commenced on or after that date.²⁰⁸

The amended RTF law imposes substantial limitations on the equitable relief available to plaintiffs in agricultural nuisance suits. In contrast to the holding in *Durham v. Britt*, the amendment narrowly defines what constitutes a “fundamental change” that would preclude the defendant from raising an affirmative defense to liability under the act.²⁰⁹ The amended statute provides that:

The provisions of subsection (a) of this section [providing nuisance immunity] shall not apply when the plaintiff demonstrates that the agricultural or forestry operation has undergone a fundamental change. A fundamental change to the operation does not include any of the following:

- (1) A change in ownership or size.
- (2) An interruption of farming for a period of no more than three years.
- (3) Participation in a government-sponsored agricultural program.
- (4) Employment of new technology.
- (5) A change in the type of agricultural or forestry product produced.²¹⁰

Even though the amended statute implicitly recognizes the limitations imposed by North Carolina Court of Appeals in *Durham v. Britt*,²¹¹ the enumerated exceptions may foreclose the possibility that any

208. Act of July 18, 2013, ch. 314, sec. 3, 2013 N.C. Sess. Laws 858, 859.

209. See *Durham v. Britt*, 117 N.C. App. 250, 254–55, 451 S.E.2d 1, 3 (1994) (noting that “a fundamental change could consist of a significant change in the type of agricultural operation, or a significant change in the hours of the agricultural operation”).

210. Act of July 18, 2013, ch. 314, sec. 1, § 106-701(a1), 2013 N.C. Sess. Laws 858, 858 (codified as amended at N.C. GEN. STAT. § 106-701(a1) (2015)). Note that the original version of the act sought to define these changes as “methods or practices that are commonly or reasonably associated with agricultural or forestry production” that created a rebuttable presumption that the agricultural or forestry operation was not a nuisance. H.R. 614, Gen. Assemb., Reg. Sess. (N.C. 2013) (as referred to the House Agricultural Committee on April 10, 2013).

211. The use of the term “fundamental change” within the amended statute strongly suggests that the drafters intended to explicitly address the North Carolina Court of Appeals’ holding in *Durham v. Britt*. See § 106-701(a1); *Durham*, 117 N.C. App. at 254–55, 451 S.E.2d at 3 (“[W]e do not believe the legislature intended [the North Carolina RTF statute] to cover situations in which a party fundamentally changes the nature of the agricultural activity which had theretofore been covered under the statute.”) (emphasis omitted). The use of the term “significant change” in similar statutes in other states further supports this contention. See, e.g., IND. CODE ANN. § 32-30-6-9(d)(1) (West 2015).

agricultural facility could undergo a fundamental change within the meaning of the statute.²¹²

The modifications to the subsection providing for the affirmative defense under the law further reinforce this interpretation.²¹³ Whereas the prior version of the statute precluded qualifying operations from nuisance liability due to “changed conditions in or about the locality *thereof* after the *same* operation has been in operation for more than one year,” the legislation modified this provision to refer only to “changed conditions in or about the locality *outside of the operation* after the operation has been in operation for more than a year.”²¹⁴ Considering these modifications to the statute, it remains unclear what, if anything, would constitute a fundamental change to preclude the applicability of the nuisance defense.²¹⁵ While the defendant bears the initial burden of raising an affirmative defense under the North Carolina RTF law,²¹⁶ the amended statute places a potentially high burden on the plaintiff to prove the existence of a fundamental change.²¹⁷

Additionally, the amendment added a fee-shifting provision, which requires the award of attorneys’ fees in a nuisance action if

212. See Zboreak, *supra* note 36, at 175 (noting that a reasonable interpretation of the ALEC model bill would permit an alfalfa farmer to change his operations into a hog farm without resetting the one-year statute of repose); *infra* Section III.C.

213. See Act of July 18, 2013, ch. 314, sec. 1, § 106-701(a), 2013 N.C. Sess. Laws 858, 858 (codified as amended at N.C. GEN. STAT. § 106-701(a) (2015)). The amended version of section (a) states: “No agricultural or forestry operation or any of its appurtenances shall be or become a nuisance, private or public, by any changed conditions in or about the locality *outside of the operation* after the operation has been in operation for more than one year, when such operation was not a nuisance at the time the operation began.” N.C. GEN. STAT. § 106-701(a) (2015) (emphasis added).

214. N.C. GEN. STAT. § 106-701(a) (2011); Act of July 18, 2013, ch. 314, sec. 1, § 106-701(a), 2013 N.C. Sess. Laws 858, 858 (codified as amended at N.C. GEN. STAT. § 106-701(a) (2015)) (emphasis added).

215. See *infra* Section III.C.

216. See *supra* notes 127–131 and accompanying text (discussing the statutory interpretation of the North Carolina RTF Act and burden of proof).

217. § 106-700–01(a1); see *infra* Section III.C (discussing the interpretation of a similar statutory provision by the Indiana state and federal courts). The legislation also created a separate subsection for the preexisting exception to nuisance immunity in cases when the “nuisance results from the negligent or improper operation of any agricultural or forestry operation or its appurtenances.” § 106-701(a2). As a result of this change, the amended statute could be interpreted to place the burden of proof on the plaintiff to raise the claim of negligent or improper operation, as well. See *Erbrich Prods. Co. v. Wills*, 509 N.E.2d 850, 858 (Ind. Ct. App. 1987) (holding that the defendant had the burden of raising the affirmative defense under the Indiana RTF statute, while plaintiff had the burden of proof for the exception for negligent operation due to its inclusion in a “subsequent, separate, and distinct subsection” within the statute).

either party asserts a “frivolous or malicious” claim.²¹⁸ As originally proposed, the amendment would have awarded attorneys’ fees to any prevailing defendant in any agricultural nuisance claim.²¹⁹ However, the final language represents a compromise position, allowing each party to recover attorneys’ fees only in cases where the other is found to have asserted a “frivolous or malicious” claim.²²⁰ Considering the limited scope of the provision to “frivolous or malicious” claims, it remains to be seen whether the fee-shifting provision will serve as a significant barrier to potential litigants.²²¹

Finally, the amendment expanded the definition of forestry operations to cover “sawmill operations.”²²² This change is particularly significant considering the recent growth of the wood pellet industry in North Carolina.²²³ The expanded definition makes it

218. Act of July 18, 2013, ch. 314, sec. 1, § 106-701(f), 2013 N.C. Sess. Laws 858, 859 (codified as amended at N.C. GEN. STAT. § 106-700-01(f) (2015)). The statute provides that:

In a nuisance action against an agricultural or forestry operation, the court shall award costs and expenses, including reasonable attorneys’ fees, to:

- (1) The agricultural or forestry operation when the court finds the operation was not a nuisance and the nuisance action was frivolous or malicious; or
- (2) The plaintiff when the court finds the agricultural or forestry operation was a nuisance and the operation asserted an affirmative defense in the nuisance action that was frivolous and malicious.

§ 106-701(f).

219. H.R. 614, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013) (as referred to the House Agricultural Committee on April 10, 2013) (“In any civil action in which an agricultural or forestry operation is alleged to be a nuisance, a prevailing defendant *shall* recover the aggregate amount of costs and expenses determined by the court to have been reasonably incurred in the defense of the nuisance action, including a reasonable amount for attorneys’ fees.”) (emphasis added). This original language closely aligned with the fee-shifting provision in the model ALEC RTF law. *See Right to Farm Act, supra* note 195; *see also* Zborek, *supra* note 36, at 175–76 (discussing ALEC’s model RTF law).

220. § 106-701(f).

221. The “frivolous and malicious” language within the provision suggests that a moving party would have to meet a significant burden in order to recover attorneys’ fees. *See id.* However, the uncertainty surrounding the interpretation of the amended law may still serve as a barrier for potential litigants. *See* Hamilton, *supra* note 73, at 111. (discussing the potential impact of a similar “soft” fee-shifting provision enacted in Iowa).

222. *See* Act of July 18, 2013, ch. 314, sec. 1, § 106-701(b1), 2013 N.C. Sess. Laws 858, 859 (codified as amended at N.C. GEN. STAT. § 106-701(b1) (2015)) (removing the language “but not sawmill operations” from the definition of “forestry operations in the existing law); *id.* (“For the purposes of this Article, ‘forestry operation’ shall mean those activities involved in the growing, managing, and harvesting of trees.”).

223. *See* Amanda Rodriguez, *Monster Enviva Wood Pellet Plants Invade Northeast NC Communities*, DOGWOOD ALLIANCE (Mar. 12, 2014), <http://www.dogwoodalliance.org/2014/03/monster-enviva-wood-pellet-plants-invade-northeast-nc-communities/> [https://perma.cc/H6PJ-LLRR]; Tom Zeller Jr., *Wood Pellets Are Big Business (And For Some, a*

much more likely that these facilities would be considered a “forestry operation” covered under the RTF law.²²⁴ The size and scale of these facilities²²⁵ illustrates the rationale for expressly excluding “sawmill operation[s]” in the original amendment to the RTF law in 1992.²²⁶ These industrial wood pellet facilities operate twenty-four hours a day, seven days a week, creating significant amounts of noise, light, and dust as well as increased traffic within the surrounding community.²²⁷ Prior to the 2013 amendment, the operation of the two existing facilities had incited protests from neighboring residents.²²⁸ Under the amended RTF law, some of these facilities may be able to raise an affirmative defense against claims brought by residents of the community that preceded the facility.²²⁹ Similar to the operation of CAFOs within the state, the nature of these facilities and their impact

Big Worry), FORBES (Feb. 1, 2015, 12:41 PM), <http://www.forbes.com/sites/tomzeller/2015/02/01/wood-pellets-are-big-business-and-for-some-a-big-worry/> [<https://perma.cc/6HPJ-PMR2>]. The development of this industry has been driven largely by the soaring demand for wood pellets in Europe associated with government policies to encourage renewable fuel sources. See Zeller, *supra*.

224. See § 106-701(b1) (defining “forestry operation[s]” as “those activities involved in the growing, managing, and harvesting of trees”).

225. The wood pellet manufacturer, Enviva is currently operating two wood pellet facilities in the state with a combined capacity to produce approximately 880 metric tons, or 1.9 billion pounds, of wood pellets per year. See *Enviva Pellets Northampton*, ENVIVA, <http://www.envivabiomass.com/manufacturing-operations/northampton/> [<https://perma.cc/B66P-S65X>] (noting the facility has a total production capacity of 510,000 metric tons per year); *Enviva Pellets Ahoskie*, ENVIVA, <http://www.envivabiomass.com/manufacturing-operations/ahoskie/> [<https://perma.cc/879S-62B7>] (“Enviva Pellets Ahoskie has a production capacity of approximately 370K metric tons and operates 24 hours a day, seven days a week.”). In addition, Enviva is in the process of constructing two new facilities in North Carolina that will effectively double its production capacity. See Chick Jacobs, *Work Begins on Wood Pellet Plant in Sampson County*, FAYETTEVILLE OBSERVER (Feb. 22, 2015), http://www.fayobserver.com/news/local/work-begins-on-wood-pellet-plant-in-sampson-county/article_0114d6a2-0746-55e4-b800-1c024fd5ec8f.html [<https://perma.cc/URU6-9BNA>] (reporting that the wood pellet plant in Sampson County is under construction and that construction will begin on another plant in Richmond County once it is completed); *Enviva Pellets Sampson, LLC*, ENVIVA, <http://www.envivabiomass.com/enviva-pellets-sampson-llc/> [<https://perma.cc/6YCC-9WDJ>] (noting production capacity of 500,000 metric tons per year).

226. See Act of July 8, 1992, ch. 892, sec. 1, § 106-701(b1), 1991 N.C. Sess. Laws 441, 441 (codified as amended at N.C. GEN. STAT. § 106-701(b1) (2015)).

227. See Rodriguez, *supra* note 223 (“Residents close to the plant have faced 24/7 extreme noise levels and bright lights. They’ve lived with sticky wood dust that coats cars, buildings and lungs in just a few minutes, as well as dangerous, heavy truck traffic.”); *Enviva Pellets Ahoskie*, *supra* note 225 (“Enviva Pellets Ahoskie has a production capacity of approximately 370K metric tons and operates 24 hours a day, seven days a week.”).

228. See Rodriguez, *supra* note 223.

229. For example, the Enviva facility in Ahoskie may be able to raise this defense as it was built on the site of a former Georgia-Pacific sawmill. *Enviva Pellets Ahoskie*, *supra* note 225.

on surrounding communities do not fit squarely within the proposed justification of the law to “reduce the loss to the State of its agricultural and forestry resources[.]”²³⁰

C. *The Example of Indiana: An Argument for a Broad Interpretation of the Amended North Carolina RTF Act*

While North Carolina’s amended RTF law has yet been subject to judicial review as of this writing, the passage and interpretation of Indiana’s RTF law may provide guidance about the potential implications for agricultural nuisance suits in North Carolina. While other states have made similar reforms to their RTF acts,²³¹ the Indiana RTF statute perhaps most closely resembles the amended North Carolina law.²³² In 2005, Indiana amended its RTF law to add similar limitations on what would constitute a significant change in operation for a facility to lose its nuisance immunity under the RTF law.²³³ In addition, Indiana further amended its RTF statute in 2012 to provide a similar fee-shifting provision.²³⁴ Prior to the passage of the 2013 amendments to the RTF law in North Carolina, the Indiana state courts, as well as the Seventh Circuit Court of Appeals, interpreted the amended Indiana RTF statute favorably for agricultural interests.²³⁵

Before Indiana amended its RTF law in 2005, the law expressly limited nuisance protections for agricultural operations in cases where there was a “significant change in the type of operation.”²³⁶ Similar to the North Carolina Court of Appeals in *Durham v. Britt*, the Indiana

230. N.C. GEN. STAT. § 106-701 (2015). These facilities provide substantial economic benefits to the region. *See Zeller, supra* note 223; Jacobs, *supra* note 225 (noting the two new Enviva wood pellet facilities are projected to provide 160 permanent jobs). On the other hand, many environmental groups question whether this extractive industry provides a sustainable development model for the region. *See Zeller, supra* note 223.

231. *See, e.g.*, Act of April 13, 2005, No. 2257, sec. 5, § 2-4-107, 2005 Ark. Acts 9681, 9683–84 (codified as amended at ARK. CODE ANN. § 2-4-107 (2015)); Act of June 20, 1995, No. 94, § 286.473, 1995 Mich. Pub. Acts. 1065, 1066–68 (codified as amended at MICH. COMP. LAWS § 286.473 (2015)).

232. Note, however, the Indiana RTF law does not exclude a finding of significant change due to an interruption in the operation of a facility like the amended North Carolina law. *Compare* IND. CODE § 32-30-6-9(d)(1) (2015), *with* N.C. GEN. STAT. § 106-701(a1)(2) (2015).

233. Act of Apr. 14, 2005, Pub. L. No. 23, sec. 1, § 32-30-6-9(d), 2005 Ind. Acts 1389, 1389–90 (codified as amended at IND. CODE § 32-30-6-9.5 (2015)).

234. Act of Mar. 15, 2012, Pub. L. No. 73, sec. 1, 2012 Ind. Acts 1047, 1047 (codified as amended at IND. CODE § 32-30-6-9.5 (2015)).

235. *See Dalzell v. Country View Family Farms, LLC*, 517 F. App’x 518, 519 (7th Cir. 2013); *Parker v. Obert’s Legacy Dairy, LLC*, 988 N.E.2d 319, 324–25 (Ind. Ct. App. 2013).

236. IND. CODE § 32-30-6-9 (2004).

Court of Appeals interpreted the prior version of the Indiana statute to preclude a defendant from raising an affirmative defense in cases “where there has been either a significant change in the hours of operation or a significant change in the type of operation.”²³⁷ However, the 2005 amendment modified the statute to provide that:

- (1) A significant change in the type of agricultural operation does not include the following:
 - (A) The conversion from one type of agricultural operation to another type of agricultural operation.
 - (B) A change in the ownership or size of the agricultural operation.
 - (C) The (i) enrollment or (ii) reduction or cessation of participation of the agricultural operation in a government program.
 - (D) Adoption of new technology by the agricultural operation.
- (2) The operation would not have been a nuisance at the time the agricultural or industrial operation began on that locality.²³⁸

In cases applying the amended statute, Indiana and federal courts have uniformly held that a significant change does not occur where the agricultural operation changes from one type of agricultural product to another.²³⁹

In *Dalzell v. Country View Family Farms, LLC*,²⁴⁰ the United States Court of Appeals for the Seventh Circuit affirmed this

237. *Laux v. Chopin Land Assocs.*, 550 N.E.2d 100, 102 (Ind. Ct. App. 1990). Similar to the North Carolina Court of Appeals in *Durham v. Britt*, the Indiana Court of Appeals in *Laux* held that the change from the cultivation of grain to hog farm constituted a significant change under the statute. *Id.* at 103; *see Durham v. Britt*, 117 N.C. App. 250, 255, 451 S.E.2d 1, 4 (1994). However, the court held that the expansion of the hog facility did not constitute a significant change under the statute. *Laux*, 550 N.E.2d at 103.

238. IND. CODE ANN. § 32-30-6-9(d) (West 2015).

239. *See, e.g., Dalzell*, 517 F. App'x at 519 (affirming the district court's statutory interpretation of the act); *Dalzell v. Country View Family Farms, LLC*, No. 1:09-cv-1567-WTL-MJD, 2012 U.S. Dist. LEXIS 130773, at *13 n.9 (S.D. Ind. Sept. 13, 2012) (“Thus while the change from a crop farm to a pig farm was a ‘significant change’ under the Act as it existed in *Laux*, it is not today.”); *Parker*, 988 N.E.2d at 324–25 (affirming summary judgment for the defendant on the grounds that the conversion of crop land to a dairy farm did not constitute a significant change). In *Parker*, the Indiana Court of Appeals rejected the plaintiff's contention that “the legislature could not have intended the Act to apply to long-time residents whose daily, rural life suffers at the hands of a “factory-like ‘mega-farm.’” *Parker*, 988 N.E.2d at 324. The court noted that “it is clear that the Act insulates the [defendant's] expansion of their dairy farm from nuisance suits under these circumstances.” *Id.* at 325.

240. 517 F. App'x 518 (7th Cir. 2013).

interpretation of the amended statute.²⁴¹ In that case, the defendant purchased a farm that had been used to plant beans and corn.²⁴² After growing crops on the property for one year, the defendant converted the property into an industrial hog farm that housed 2,800 swine.²⁴³ The neighboring property owners who had lived there prior to the defendant brought a nuisance suit against the farm.²⁴⁴ Affirming the district court's grant of summary judgment for the agricultural producer,²⁴⁵ the Seventh Circuit expressly rejected the plaintiffs' arguments that the RTF act should not be applicable because they did not "come to the nuisance."²⁴⁶ In support of its holding, the court noted that the land in question had been in agricultural use since 1956, and affirmed that a change in the type of agricultural operation does not constitute a significant change under the amended RTF statute.²⁴⁷

The Seventh Circuit in *Dalzell* also adopted a strict interpretation of the statutory exemption for the affirmative defense in cases of negligent operation.²⁴⁸ In spite of substantial evidence that the defendant operated several aspects of the farm negligently, the court affirmed the district court's holding that the plaintiffs failed to demonstrate that the negligent operation was the proximate cause of the alleged nuisance.²⁴⁹ The district court noted ten separate instances in which the farm in question had been operated in a negligent manner, including several instances of poor husbandry and odor control practices, land application of manure directly adjacent to neighboring property lines, and negligent management of the "mortality composter."²⁵⁰ Nevertheless, the Seventh Circuit held that the plaintiff failed to demonstrate that the nuisance "result[ed] from"

241. *Id.* at 519.

242. *Dalzell*, 2012 U.S. Dist. LEXIS 130773, at *3.

243. *Id.* at *3.

244. *Id.*

245. *Id.* at *14–15, *21–23.

246. *Dalzell*, 517 F. App'x at 519.

247. *Id.*

248. *See id.* at 520. The relevant provision of the Indiana RTF law states: "This section does not apply if a nuisance results from the negligent operation of an agricultural or industrial operation or its appurtenances." IND. CODE ANN. § 32-30-6-9(a) (West 2015).

249. *Dalzell*, 517 F. App'x at 520. The Seventh Circuit placed particular emphasis on the plaintiffs' failure to quantify the relative contribution of the odor due to the defendant's negligent operation of the facility. *Id.*

250. *Dalzell*, 2012 U.S. Dist. LEXIS 130773 at *15–16.

the negligent operation because the plaintiff failed to provide sufficient evidence linking the odor to the defendant's negligence.²⁵¹

Even though the interpretation of the Indiana RTF act is not binding authority on a North Carolina court, it does suggest that the North Carolina RTF law provides broad protections to agricultural and forestry facilities from nuisance liability. However, the exact scope of these protections deserves further attention in light of the statutory text and existing jurisprudence in North Carolina.

D. The Case for a Narrow Interpretation of the Amended North Carolina RTF Law

The extensive protections afforded to agricultural facilities in the amended North Carolina RTF law favor a narrow interpretation of the existing statute, particularly in light of the constitutional concerns under the Fifth Amendment discussed in Part IV. The law should be interpreted more consistently with its stated purpose to protect agricultural land from encroachment by non-agricultural uses.²⁵² In light of the broad enumerated exclusions in the statute, it remains unclear what would constitute a "fundamental change" that would preclude a defendant from raising an affirmative defense to liability.²⁵³ However, it is a basic tenant of statutory interpretation that every term within a statute is presumed to have meaning and be given effect.²⁵⁴ To prevent the exceptions from swallowing the rule,

251. *Dalzell*, 517 F. App'x at 520. The district court specifically rejected the plaintiff's claim that such causation should be presumed to be "within the understanding of an ordinary layperson," noting that "[t]he problem is that neither the Plaintiffs nor their expert are able to say that Sky View would not be a nuisance *but for* the (alleged) fact that it is negligently operated." *Dalzell*, 2012 U.S. Dist. LEXIS 130773 at *21 n.12.

252. See N.C. GEN. STAT. § 106-700 (2015) ("When other land uses extend into agricultural and forest areas, agricultural and forestry operations often become the subject of nuisance suits. As a result, agricultural and forestry operations are sometimes forced to cease. Many others are discouraged from making investments in farm and forest improvements.").

253. See *id.* § 106-701(a1). The statute provides that a defendant is precluded from raising an affirmative defense when "the plaintiff demonstrates that the agricultural or forestry operation has undergone a fundamental change." *Id.* On its face, the statute excludes many potential changes from consideration, including a change in size or ownership, change in the type of agricultural or forestry operation, an interruption in operation for less than three years, and use of a new technology. *Id.*

254. *Neil v. Kuester Real Estate Servs., Inc.*, 237 N.C. App. 132, 146, 764 S.E.2d 498, 508 (2014) ("[W]e presume that no part of a statute is mere surplusage, but that each provision adds something not otherwise included therein.") (quoting *Fort v. Cty. of Cumberland*, 218 N.C. App. 401, 407, 721 S.E.2d 350, 355 (2012)).

there must be some changes in operations that would be considered a “fundamental change” under the statute.²⁵⁵

The narrow definition of “fundamental change” brings new importance to what constitutes an agricultural or forestry operation under the RTF statute. Agricultural and forestry operations may be permitted to tack on consecutive prior uses and change the type of operation or ownership without restarting the one-year statutory limitation.²⁵⁶ Considering the broad statutory definition of “agricultural operation,”²⁵⁷ it seems likely that many agricultural facilities will be shielded under the Act.²⁵⁸ On the other hand, forestry operations are defined more narrowly under the statute.²⁵⁹ While removing the sawmill exclusion in the statute does suggest that the law should cover at least *some* sawmill operations,²⁶⁰ the statute does not extend protections to all such facilities “without limitation.”²⁶¹

255. For example, a “significant change in the hours of the agricultural operation” may be considered a fundamental change that does not fall under the exclusion because it was expressly mentioned in *Durham v. Britt* and was not subsequently included in the amendment. 117 N.C. App. 250, 255, 451 S.E.2d 1, 3 (1994).

256. See *supra* notes 213–217 and accompanying text; *Dalzell*, 2012 U.S. Dist. LEXIS 130773, at *13 n.9 (“Thus while the change from a crop farm to a pig farm was a ‘significant change’ under the Act as it existed in *Laux*, it is not today.”). One interpretation of the law would permit an agricultural operation to significantly change the scope and type of its operations, but still raise the affirmative defense under the RTF Act if the prior operation was entitled to protections under the Act. See *supra* Section III.C (discussing the interpretation of a similar RTF law in Indiana); Zborek, *supra* note 36, at 175 (discussing the interpretation of a similar provision contained in ALEC’s Model RTF law).

257. § 106-701(b) (“For the purposes of this Article, ‘agricultural operation’ includes, *without limitation*, any facility for the production for commercial purposes of crops, livestock, poultry, livestock products, or poultry products.”) (emphasis added).

258. See *Durham*, 117 N.C. App. at 254, 451 S.E.2d at 3 (“We believe the legislature intended this statute to cover any agricultural operation, without limitation, when the operation was initially begun.”).

259. § 106-701(b1) (“For the purposes of this Article, ‘forestry operation’ shall mean those activities involved in the growing, managing, and harvesting of trees.”)

260. See *id.* § 106-701(b1); Act of July 18, 2013, ch. 314, sec. 1, § 106-701(b1) 2013 N.C. Sess. Laws 858, 859 (codified as amended at N.C. GEN. STAT. § 106-701 (2015)).

261. Unlike the definition of agricultural operations, the RTF law does not apply to all forestry operations “without limitation.” Compare § 106-701(b) (“For the purposes of this Article, ‘agricultural operation’ includes, *without limitation*, any facility for the production for commercial purposes of crops, livestock, poultry, livestock products, or poultry products.”) (emphasis added), with *id.* § 106-701(b1) (“For the purposes of this Article, ‘forestry operation’ shall mean those activities involved in the growing, managing, and harvesting of trees.”). Similar to the distinction drawn between an industrial hog farm and traditional farming techniques in *Durham v. Britt*, the underlying rationale to protect farmland from non-agricultural development supports a limited reading of the statute. See *supra* notes 167–172 and accompanying text; see also *supra* notes 223–227 and accompanying text (noting the size and scale of wood pellet facilities in operation in North Carolina and their impact on the surrounding communities).

Regardless, the broad statutory definitions of agricultural and forestry operations under the RTF law could have significant implications for neighboring landowners in agricultural nuisance suits.

Considering the phrase “changed condition” in light of the statutory purpose and its prior interpretation by the North Carolina Court of Appeals, the application of the RTF act should be limited to “case[s] in which the non-agricultural use extended into an agricultural area.”²⁶² Absent an underlying change in the use of a neighboring property, a defendant should not be able to raise an affirmative defense under the RTF act simply because there was a change in ownership. Indeed, it would be unreasonable to interpret a statute that supposedly codifies the doctrine of “coming to the nuisance” as allowing only *one* party to benefit from tacking on prior use. Similarly, the RTF law should not apply in nuisance suits between two agricultural facilities, as the application of nuisance protections under these circumstances does not align with the stated purpose of the RTF law.²⁶³

The existing limitations on plaintiffs bringing agricultural nuisance suits further support a narrow interpretation of the statute. As seen in *Dalzell v. Country View Farms*,²⁶⁴ the difficulty of proving whether a nuisance “results from” the negligent operation of a facility

262. *Mayes v. Tabor*, 77 N.C. App. 197, 201, 334 S.E.2d 489, 491 (1985). *But see* *Toftoy v. Rosenwinkel*, 983 N.E.2d 463, 467 (Ill. 2012) (reversing the denial of summary judgment, holding that the plaintiffs’ acquisition of the property constituted a “changed condition” giving rise to the application of the Illinois RTF even though the non-agricultural use predated the agricultural facility). In *Mayes v. Tabor*, the court placed particular emphasis on the length of time the property had been used for non-agricultural purposes rather than how long the property had been in possession of its present owner. 77 N.C. App. at 201, 334 S.E.2d at 491 (noting the private summer camp had been in existence for sixty years).

263. *See Mayes*, 77 N.C. App. at 201, 334 S.E.2d at 491. Other states, including Indiana, have similarly interpreted their RTF laws to not apply in nuisance actions between two agricultural facilities. *See TDM Farms, Inc. v. Wilhoite Fam. Farm, LLC*, 969 N.E.2d 97, 110 (Ind. Ct. App. 2012); *Stickdorn v. Zook*, 957 N.E.2d 1014, 1024 n.5 (Ind. Ct. App. 2011); *see also Buchanan v. Simplot Feeders Ltd. Pshp.*, No. CS-95-236-FVS, 1998 U.S. Dist. LEXIS 21780, at *11 (E.D. Wash. May 29, 1998) (“[The Washington RTF] should not be read to insulate agricultural enterprises from nuisance actions brought by an agricultural or other rural plaintiff, especially if the plaintiff occupied the land before the nuisance activity was established.” (quoting *Buchanan v. Simplot Feeders Ltd.*, 952 P.2d 610, 616 (Wash. 1998))); Jesse J. Richardson, Jr. & Theodore A. Feitshans, *Nuisance Revisited after Buchanan and Bormann*, 5 DRAKE J. AGRIC. L. 121, 133–35 (2000) (discussing the court’s interpretation in the *Buchanan* cases).

264. *See Dalzell v. Country View Fam. Farms, LLC*, 517 F. App’x 518, 520 (7th Cir. 2013).

could limit equitable relief under the current law.²⁶⁵ In addition, a plaintiff's alternative means of redress are limited by strict local zoning ordinances regulating agricultural facilities.²⁶⁶ North Carolina courts have not yet addressed whether the RTF law could be applied to bar certain trespass actions.²⁶⁷ Outside of the protections afforded to agricultural facilities under the RTF statute, plaintiffs also face both procedural and substantive barriers to bringing a cognizable nuisance claim.²⁶⁸ Together, these limitations on individual property rights may render the RTF law unconstitutional under the Takings Clause.

IV. CONSTITUTIONALITY OF NORTH CAROLINA'S RTF ACT UNDER THE TAKINGS CLAUSE

As agricultural facilities have been granted greater protections from nuisance suits at the expense of neighboring landowners, the constitutionality of many RTF laws under the Takings Clause has been called into question.²⁶⁹ While constitutional challenges have

265. However, the North Carolina RTF law may arguably provide more protection for potential plaintiffs as it applies to both "negligent" and "improper" operation of a facility as opposed to only "negligent" operation. *Compare* N.C. GEN. STAT. § 106-701(a2) (2015) (applying to both improper and negligent operation), *with* IND. CODE ANN. § 32-30-6-9(a) (West 2015) (applying to negligent operation only).

266. *See* N.C. GEN. STAT. § 106-701(d) (2015). In addition, the Supreme Court of North Carolina has held that the state laws regarding the siting and regulation of swine facilities preempt any local ordinances regulating those facilities. *Craig v. Cty. of Chatham*, 356 N.C. 40, 50, 565 S.E.2d 172, 179 (2002); *see* Christy Noel, Recent Development, *Preemption Hogwash: North Carolina's Judicial Repeal of Local Authority to Regulate Hog Farms in Craig v. County of Chatham*, 80 N.C. L. Rev. 2121, 2121–24 (2002) (discussing implications of *Craig v. County of Chatham*).

267. *Compare* *Buchanan v. Simplot Feeders Ltd.*, 952 P.2d 610, 618 (Wash. 1998) (holding that right-to-farm law did not preclude trespass actions due to legislative history and express damages savings provision within the statute), *with* *Rancho Viejo v. Tres Amigos Viejos*, 123 Cal. Rptr. 2d 479, 489–90 (Cal. Ct. App. 2002) (distinguishing the holding in *Buchanan* to bar certain trespass actions on the basis that a California provision did not contain an express damages clause).

268. From a procedural standpoint, failure to comply with the requirements for mediated prelitigation settlement conferences prior to commencing a nuisance action may also serve as a bar to recovery. *See supra* notes 202 and accompanying text. In addition, plaintiffs may face certain hurdles in bringing a cognizable legal claim. *See In re N.C. Swine Farm Nuisance Litig.*, No. 5:15-CV-13-BR, 2015 U.S. Dist. LEXIS 83157, at *78 (E.D.N.C. June 24, 2015) (noting that it is unclear whether "annoyance and discomfort" damages are available within the context of a temporary nuisance action in North Carolina); *Neuse River Found. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 116–17, 574 S.E.2d 48, 53 (2002) (holding that riparian waterfront owners and river-preservation associations failed to establish special damages in public nuisance suit against hog producers, as aesthetic and recreational interests alone are insufficient to confer standing).

269. *See, e.g.*, Centner, *supra* note 140, at 88–89; Duke & Malcolm, *supra* note 18, at 297–98.

been raised against RTF laws across the country,²⁷⁰ as of this writing, the Supreme Court of Iowa remains the only court to hold that an RTF law effected an unconstitutional taking.²⁷¹ In light of the broad protections afforded to agricultural facilities, the amended North Carolina RTF law raises significant constitutional concerns, particularly as a regulatory taking.

A. *General Overview of Takings Jurisprudence*

The Fifth Amendment of the United States Constitution provides that “private property [shall not] be taken for public use, without just compensation.”²⁷² Applicable to both federal and state governments under the Fifth and Fourteenth Amendments,²⁷³ the Takings Clause “does not prohibit the taking of private property, but instead places a condition on the exercise of that power.”²⁷⁴ Indeed, the Supreme Court has recognized that the reasonable exercise of a state’s police power permits some interference with the property rights of individuals without giving rise to a compensable taking.²⁷⁵ The Takings Clause, however, “bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”²⁷⁶ In addition to the cases where “the government directly appropriates private property for public use,”²⁷⁷ the Supreme Court has held that “if a regulation goes

270. See *infra* notes 300–336 and accompanying text.

271. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 173–74, 179 (Iowa 2004) (holding nuisance-related RTF statute unconstitutional under the inalienable rights clause and takings clause of the Iowa Constitution); *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321–22 (Iowa 1998) (holding a zoning-related RTF provision to be an unconstitutional taking under both the federal and state constitution).

272. U.S. CONST. amend. V.

273. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (citing *Chi., B. & Q.R. Co. v. Chi.*, 166 U.S. 226, 241 (1897)).

274. *Lingle*, 544 U.S. at 536 (quoting *First English Evangelical Lutheran Church of Glendale v. Cty. of L.A.*, 482 U.S. 304, 314 (1987)).

275. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321–22 (2002) (“[T]he Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.”). On the other hand, any state action may still violate the Due Process Clause if it is found to be “arbitrary and irrational.” *E. Enters. v. Apfel*, 524 U.S. 498, 537 (1998) (plurality opinion) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)). While the Court has noted that a regulation with a severe retroactive application may give rise to a successful due process challenge, the Court has generally been reluctant to invalidate economic legislation under the Due Process Clause. *E. Enters.*, 524 U.S. at 537.

276. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

277. *Tahoe*, 535 U.S. at 324 (quoting *E. Enters.*, 524 U.S. at 522).

too far it will be recognized as a taking.”²⁷⁸ Nevertheless, the proper test to determine whether a government regulation results in a compensable taking is less clear.²⁷⁹

The United States Supreme Court attempted to clarify the test to determine whether a government regulation amounts to a taking of private property.²⁸⁰ In *Lucas v. South Carolina Coastal Council*,²⁸¹ the Court outlined two instances in which government action amounts to a per-se categorical taking: (1) when the government causes the property owner to suffer a physical invasion of his or her property; and (2) when the government regulation “denies all economically beneficial or productive use of the land.”²⁸² Within the context of land-use regulations, the Court in *Lucas* affirmed that the Fifth Amendment imposes limitations on the exercise of the state’s police power.²⁸³ Similarly, the Court has also recognized that the government’s appropriation of an easement on private property may give rise to a compensable taking in the context of land-use permitting.²⁸⁴

In most instances, the question of whether a government regulation has “gone too far” requires the court to conduct an “ad hoc, factual inquiry,” considering “the character of the action and . . . the nature and extent of the interference with rights in the parcel as a

278. *Tahoe*, 535 U.S. at 326 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

279. See, e.g., Timothy M. Mulvaney, *Uncertainties Remain for Judicial Takings Theory*, 24 PROB. & PROP. 11, 11 (2010).

280. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014–19.

281. 505 U.S. 1003 (1992).

282. *Id.* at 1015. See generally *Richardson & Feitshans*, *supra* note 263, at 131–32 (outlining an interpretation of the test set forth in *Lucas*).

283. *Lucas*, 505 U.S. at 1030 (holding that beachfront regulations that prevented the plaintiff from building any habitable structure on his property constituted a categorical taking). See *id.* 1022–26 (discussing the limitations on the state’s police power to enjoin “harmful and noxious” uses of property).

284. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 841 (1987). Within the context of land use regulations, the Court has also recognized the government’s right to “condition approval of a permit on the dedication of property to the public so long as there is a nexus and rough proportionality between the property that the government demands and the social costs of the applicant’s proposal.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013) (citing *Nollan*, 483 U.S. at 837; *Dolan*, 512 U.S. at 391). While the Court has extended this taking analysis from the dedication of an easement to the extraction of monetary fees, this constitutional analysis has not been extended beyond the context of a government permitting process. See *id.* at 2599–601; *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546–48 (2005) (discussing the Supreme Court’s decisions in *Nollan* and *Dolan*).

whole.”²⁸⁵ In *Penn Central Co. v. New York City*,²⁸⁶ the Supreme Court identified three factors to consider when determining whether a taking has occurred: (1) the economic impact of the regulation on the property owner; (2) the property owner’s investment backed expectations; and (3) the “character of the government action.”²⁸⁷ The *Penn Central* framework has no exact formula and “necessarily entails complex factual assessments of the purposes and economic effects of government actions.”²⁸⁸

While the North Carolina Constitution does not explicitly prohibit the taking of private property for public use without just compensation, the Supreme Court of North Carolina has inferred this right from the “law of the land” clause in Article I, Section 19 of the North Carolina Constitution.²⁸⁹ North Carolina courts apply a takings analysis similar to *Penn Central* to determine whether a regulation constitutes a compensable taking under the North Carolina Constitution.²⁹⁰ Outside of the traditional exercise of eminent domain, a compensable taking can arise from the unreasonable exercise of the state’s police power²⁹¹ or any “substantial interference

285. *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Plan. Agency*, 535 U.S. 302, 327 (2002) (quoting *Penn Cent. Co. v. New York City*, 438 U.S. 104, 124, 130–31 (1978)).

286. 438 U.S. 124 (1978).

287. *Id.*

288. *Tahoe-Sierra*, 535 U.S. at 323 (quoting *Yee v. City of Escondido*, 503 U.S. 519, 523 (1992)).

289. *Piedmont Triad Reg’l Water Auth. v. Unger*, 154 N.C. App. 589, 592, 572 S.E.2d 832, 834 (2002) (quoting *Finch v. City of Durham*, 325 N.C. 352, 363, 384 S.E.2d 8, 14 (1989), *reh’g denied*, 325 N.C. 714, 388 S.E.2d 452–53 (1989)); see N.C. CONST. art. I, § 19 (“No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.”). “A ‘taking’ has been defined as ‘entering upon private property for more than a momentary period, and under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof.’” *E. Appraisal Servs. v. State*, 118 N.C. App. 692, 695, 457 S.E.2d 312, 313 (1995) (quoting *Stillings v. City of Winston-Salem*, 311 N.C. 689, 692, 319 S.E.2d 233, 236 (1984)).

290. See *Town of Nags Head v. Toloczko*, No. 2:11-CV-1-D, 2014 WL 4219516, at *11 n.7 (E.D.N.C. Aug. 18, 2014) (applying the same takings analysis to assess both the federal and state takings claims); *King ex rel Warren v. State*, 125 N.C. App. 379, 385, 481 S.E.2d 330, 333–34 (1997) (citing *Finch*, 325 N.C. at 364, 384 S.E.2d at 15; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)) (noting the similarity between the takings analysis set forth in the Supreme Court’s takings analysis in *Lucas* and that of the Supreme Court of North Carolina’s in *Finch*).

291. The inquiry into whether a compensable taking has occurred largely depends on “whether a particular act is an exercise of the police power or of the power of eminent domain.” *Kirby v. N.C. Dep’t of Transp.*, __ N.C. __, __, 786 S.E.2d 919, 924 (2016) (quoting *Barnes v. N.C. State Highway Comm’n*, 257 N.C. 507, 514, 126 S.E.2d 732, 737–38 (1962)). In cases where the state is deemed to have exercised its police power, state courts have employed an ends-means test to determine whether: (1) “the ends sought, *i.e.*, the

with elemental rights growing out of the ownership of the property.”²⁹² The Supreme Court of North Carolina has recognized that “[a] nuisance maintained by a governmental agency impairing private property is a taking in the constitutional sense.”²⁹³ However, the plaintiff must meet its burden of showing that the property value has been “substantially impaired.”²⁹⁴ Within the context of land-use regulations, courts have generally limited the finding of a compensable regulatory taking to cases where the land owner has been “deprived of all practical use and reasonable value of the property.”²⁹⁵

The uncertainty surrounding the constitutionality of RTF laws largely reflects the ambiguous nature of nuisance-related takings cases.²⁹⁶ The maintenance of a nuisance does not fit neatly within the traditional distinction between the physical invasion²⁹⁷ and regulation of someone’s property²⁹⁸ in takings jurisprudence.²⁹⁹ However, a

object of the legislation, is within the scope of the [police] power”; and (2) “the means chosen to regulate are reasonable.” *Finch*, 325 N.C. at 363, 384 S.E.2d at 14 (quoting *Responsible Citizens v. City of Asheville*, 308 N.C. 255, 261, 302 S.E.2d 204, 208 (1983)).

292. *Kirby*, __ N.C. __, 786 S.E.2d at 925 (quoting *Long v. City of Charlotte*, 306 N.C. 187, 198–99, 293 S.E.2d 101, 109 (1982) *superseded on other grounds by* Act of July 10, 1981, ch. 919, sec. 28, 1981 N.C. Sess. Laws 1382, 1402); *see id.* at __, 786 S.E.2d at 924 (defining “property” as “every aspect of right and interest capable of being enjoyed as such upon which it is practicable to place a money value” (quoting *Hildebrand v. S. Bell Tel. v. Tel. Co.*, 219 N.C. 402, 408, 14 S.E.2d 252, 256 (1941))).

293. *Midgett v. N.C. State Highway Comm’n*, 260 N.C. 241, 248, 132 S.E.2d 599, 606 (1963) (citing *Raleigh v. Edwards*, 235 N.C. 671, 674–75, 71 S.E.2d 396, 399 (1952)), *overruled on other grounds by* *Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 304 S.E.2d 164 (1983); *see Long*, 306 N.C. at 198–99, 293 S.E.2d at 109 (“Modern construction of the ‘taking’ requirement is that an actual occupation of the land, dispossession of the landowner or even a physical touching of the land is not necessary; there need only be a substantial interference with elemental rights growing out of the ownership of the property.”).

294. *Midgett*, 260 N.C. at 248, 132 S.E.2d at 606 (citing *McKinney v. City of High Point*, 237 N.C. 66, 76–77, 74 S.E.2d 440, 447–48 (1953)); *see Long*, 306 N.C. at 200, 293 S.E.2d at 110 (noting the interference must be “substantial enough to reduce the market value of his property.”).

295. *King*, 125 N.C. App. 379, 386, 481 S.E.2d 330, 334 (1997). *But see Kirby*, __ N.C. __, 786 S.E.2d at 925 (holding that indefinite restrictions on development placed on properties by the North Carolina Department of Transportation within a proposed highway development corridor constituted a compensable regulatory taking).

296. *See* Carlos A. Ball, *The Curious Intersection of Nuisance and Takings Law*, 86 B.U. L. REV. 819, 812–22 (2006).

297. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (holding the physical installation of cable equipment constituted a categorical taking).

298. *See, e.g., Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 136–38 (1978) (holding that New York City’s landmarks law did not constitute a regulatory taking).

nuisance can constitute a compensable taking in certain circumstances,³⁰⁰ particularly under the theory of inverse condemnation.³⁰⁰

In *Richards v. Washington Terminal Co.*³⁰¹ the Supreme Court offered some guidance as to how to interpret nuisance-related cases.³⁰² In *Richards*, the plaintiff argued that the maintenance of a railroad track and tunnel adjacent to his property gave rise to a compensable taking under the Fifth Amendment.³⁰³ The Court held that “the acts of Congress in the light of the Fifth Amendment, [] do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him.”³⁰⁴ The Court noted that “sharing in the common burden of incidental damages arising from the legalized nuisance” does not give rise to a compensable taking.³⁰⁵ Thus, the Court drew a distinction between the harm due to the noise, smoke, and vibrations equally shared among his neighbors due to their general proximity to the railroad tracks and singular harm to the plaintiff from the operation of a fanning system in the railroad tunnel.³⁰⁶ The Court held that a compensable taking had occurred solely because of the “peculiar and substantial” harm to the plaintiff by operation of the tunnel.³⁰⁷

299. Ball, *supra* note 296, at 848–50 (comparing and contrasting nuisance-related takings with more traditional regulatory takings).

300. Inverse condemnation represents a cause of action where the government effects a taking of private property without providing adequate compensation. *See Kirby*, __ N.C. __, 769 S.E.2d at 227. Under this theory, courts have recognized compensable takings for nuisance-related claims. *See, e.g., United States v. Causby*, 328 U.S. 256 (1946); *Richards v. Wash. Terminal Co.*, 233 U.S. 546, 557 (1914); *Cochran v. City of Charlotte*, 53 N.C. App. 390, 406, 281 S.E.2d 179, 191 (1981) (affirming holding that flights of commercial aircraft over the plaintiffs’ property gave rise to a compensable taking); *Ivester v. City of Winston-Salem*, 215 N.C. 1, 5, 1 S.E.2d 88, 90 (1939); *Hines v. City of Rocky Mt.*, 162 N.C. 409, 412, 78 S.E. 510, 511 (1913) (holding that the odors from a municipal trash dump near the plaintiff’s land constituted a nuisance and a taking). However, inverse condemnation claims are subject to a two-year statute of limitations in North Carolina, N.C. GEN. STAT. § 40A-51(a) (2015); *see Peach v. City of High Point*, 199 N.C. 359, 368, 683 S.E.2d 717, 724 (2009); *infra* note 337 (discussing the application of the statute of limitations).

301. 233 U.S. 546 (1914).

302. Ball, *supra* note 296, at 829–31.

303. *Richards*, 233 U.S. at 549.

304. *Id.* at 557.

305. *Id.* at 554. *See Causby*, 328 U.S. at 262 (distinguishing the physical invasion associated with low-altitude airplane flights over a property with the “incidental damages” present in *Richards*).

306. *Richards*, 233 U.S. at 554.

307. *Id.*; *see Spiek v. Mich. Dep’t of Transp.*, 572 N.W.2d 201, 210 (Mich. 1998) (holding that a plaintiff must allege a harm “differs in kind” rather than by degree from

Even though *Richards* remains rather dated in light of the framework set forth in *Penn Central* and its subsequent cases, the Court's distinction between "peculiar and substantial harm" and "incidental damages arising from a legalized nuisance" provides a useful starting point for assessing nuisance-related takings cases.³⁰⁸ A review of the cases considering the constitutionality of RTF laws will provide a better framework in which to assess the North Carolina RTF law.

B. Constitutionality of RTF Acts Under the Takings Clause

In interpreting RTF laws under the Takings Clause, state courts have been divided as to whether the maintenance of an ongoing nuisance rises to the level of a categorical taking.³⁰⁹ Furthermore, state courts have yet to explicitly assess the application of an RTF law as a regulatory taking under the traditional *Penn Central* balancing analysis.³¹⁰ Accordingly, it remains unclear how a court would address such a constitutional challenge to the North Carolina RTF law in its current form. This divergent line of cases suggests that an analysis of the RTF law as a regulatory taking could be the appropriate line of inquiry in this case.

those living near a public highway to state a takings claim upon which relief could be granted).

308. *Richards*, 233 U.S. at 554. See *Causby*, 328 U.S. at 262 (distinguishing the physical invasion associated with low-altitude airplane flights over a property with the "incidental damages" present in *Richards*); *Spiek*, 572 N.W.2d at 208–10 (holding that a plaintiff must allege a harm "differs in kind" rather than by degree from those living near a public highway to state a takings claim upon which relief could be granted) (citing *Richards*, 233 U.S. at 552–54). Indeed, some have argued that this "peculiar and substantial" burden analysis should form the basis for a new intermediate level of scrutiny for nuisance cases, adopting a framework that falls between the finding of a categorical taking and application of the traditional *Penn Central* balancing test. Ball, *supra* note 296, at 850.

309. The Supreme Court of Iowa remains the only court to recognize that the maintenance of a nuisance creates an easement that rises to the level of a physical invasion. See *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 174 (Iowa 2004) (holding nuisance-related RTF statute unconstitutional under the takings clause of the Iowa Constitution); *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 322 (Iowa 1998) (holding a zoning-related RTF provision to be an unconstitutional taking under both the federal and state constitution). Similarly, the Supreme Court of Washington acknowledged in dictum that nuisance immunity from Washington's RTF created "a quasi easement against the urban developments to continue those nuisance activities." *Buchanan v. Simplot Feeders Ltd.*, 952 P.2d 610, 615 (Wash. 1998). At least three other state courts have rejected this approach, based on the jurisprudence within their states. See *infra* notes 321–329 and accompanying text.

310. See, e.g., *supra* notes 311–336 and accompanying text.

The Supreme Court of Iowa remains the only court to strike down an RTF statute as an unconstitutional taking.³¹¹ In *Bormann v. Board of Supervisors*,³¹² the Supreme Court of Iowa found a zoning-related RTF statute unconstitutional under both the Takings Clause of the Fifth Amendment and that of the Iowa Constitution.³¹³ The plaintiffs' properties in question had been designated as "agricultural area[s.]" as provided for in the Iowa RTF statute; this approval cloaked agricultural facilities with immunity from nuisance suits so long as their facilities operated non-negligently.³¹⁴ Declining to analyze the application of the RTF act as a regulatory taking under the *Penn Central* balancing test, the court held that the non-trespassory invasion associated with the dust and odor from the agricultural facility constituted a categorical taking under both the federal and state constitutions.³¹⁵ In support of its holding, the court recognized that the nuisance immunity provided under the RTF statute created an easement over the adjoining property, which is a constitutionally protected property interest under the federal and Iowa state constitutions.³¹⁶

Furthermore, in *Gacke v. Pork Extra, L.L.C.*,³¹⁷ the Supreme Court of Iowa reaffirmed the holding in *Bormann*, and further held a nuisance-related RTF statute³¹⁸ to be in violation of the Takings Clause and the "inalienable rights" clause of the Iowa Constitution.³¹⁹

311. See *infra* notes 312–320 and accompanying text.

312. 584 N.W.2d 309 (Iowa 1998).

313. *Id.* at 321.

314. *Id.* at 311–12.

315. *Id.* at 321. "The rule finding constitutionality in close cases cannot control the present one, however, because, with all respect, this is not a close case. When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers." *Id.* at 322.

316. *Id.* at 316 (citing *United States v. Welch*, 217 U.S. 333, 339 (1910)). In support of its holding, the *Bormann* court cited several cases in which a non-trespassory invasion was found to be an unconstitutional taking, analogizing the facts of the case to those in *Richards v. Wash. Terminal Co.* *Id.* at 319 (citing *Richards*, 233 U.S. 546 (1914)).

317. 684 N.W.2d 168 (Iowa 2004).

318. While similar to the North Carolina RTF in some respects, the statute in *Gacke* differs from the amended North Carolina RTF law in that it lacks any sort of statutory waiting period before an agricultural facility may benefit from the nuisance protections. Compare N.C. GEN. STAT. § 106-701(a) (2015), with IOWA CODE ANN. § 657.11(2) (West 2015).

319. *Gacke*, 684 N.W.2d at 174.

However, the *Gacke* court declined to address whether the statute was unconstitutional under the Fifth Amendment.³²⁰

Other states have declined to adopt this interpretation and have upheld RTF laws as constitutional under the federal and state takings clause, distinguishing *Bormann*'s holding that the right to maintain a nuisance constitutes an easement.³²¹ In *Lindsey v. DeGroot*,³²² the Indiana Court of Appeals rejected a constitutional challenge to Indiana's recently amended RTF law.³²³ The plaintiffs had purchased a ten-acre plot of undeveloped woods and built a home in rural Indiana.³²⁴ Three years later, the defendant converted a neighboring hog operation into a large commercial dairy farm.³²⁵ As part of its operation, the farm maintained large waste lagoons and began spraying manure over a field adjacent to the plaintiff's property.³²⁶ Citing the Supreme Court of Iowa's decision in *Bormann*, the plaintiff alleged the act was an unconstitutional taking because it created an easement over his property.³²⁷ In its opinion, the court distinguished the holding in *Bormann* on the grounds that Indiana case law did not recognize that the *maintenance* of a nuisance created an easement.³²⁸ The *Lindsey* court also declined to address whether the application of the RTF could give rise to a compensable taking under the *Penn Central* balancing test.³²⁹

While the existing case law suggests that a court is unlikely to find that North Carolina's amended RTF law gives rise to a

320. *Id.* Some commentators have suggested that this dicta on the part of the Supreme Court of Iowa reflects that the holding in *Bormann* may be limited to the Iowa Constitution and that the holding in *Bormann* is erroneous as it relates to the federal Takings Clause. See Centner, *supra* note 140, at 119–20.

321. See Moon v. N. Idaho Farmers Ass'n, 96 P.3d 637, 645 (Idaho 2004); Barrera v. Hondo Creek Cattle Co., 132 S.W.3d 544, 549 (Tex. App. 2004).

322. 898 N.E.2d 1251 (Ind. Ct. App. 2009).

323. *Id.* at 1254, 1259 (affirming summary judgment for the defendant and holding the Indiana RTF law was constitutional).

324. *Id.*

325. *Id.*

326. Lindsey v. DeGroot, No. 35D01-0312-PL-00262, slip op. at 3–5 (Ind. Super. Ct. 2008).

327. Lindsey, 898 N.E.2d at 1257–58 (citing Bormann v. Bd. of Supervisors, 584 N.W.2d 309 (Iowa 1998)).

328. *Id.* at 1258 (citing Barrera v. Hondo Creek Cattle Co., 132 S.W.3d 544, 549 (Tex. App. 2004); Moon v. N. Idaho Farmers Ass'n, 96 P.3d 637, 645 (Idaho 2004)); see Armstrong v. Maxwell Farms of Ind., Inc., No. 68C01-0912-CT-0539, (Ill. Cir. Ct. July 10, 2014); Jason Jordan, Comment, *A Pig in the Parlor or Food on The Table: Is Texas's Right to Farm Act an Unconstitutional Mechanism to Perpetuate Nuisances or Sound Public Policy Ensuring Sustainable Growth?*, 42 TEX. TECH L. REV. 943, 968–70 (2010) (discussing the court's holding in Barrera).

329. See Lindsey, 898 N.E.2d at 1257–58.

categorical taking, the amended RTF law could still be found to be unconstitutional as a regulatory taking. Many commentators have criticized the holding in *Bormann* and *Gacke*, arguing that recognizing a nuisance-related easement as a categorical taking establishes an overly broad interpretation of the Takings Clause.³³⁰ Given the similarities of Indiana's RTF statute to the current North Carolina RTF statute,³³¹ a court could be less likely to hold that the amended RTF law constitutes a categorical taking, particularly in light of the existing criticism of the *Bormann* and *Gacke* opinions.³³²

In light of the issues raised within these divergent opinions, the *Penn Central* balancing test is best suited for determining whether an RTF act creates an unconstitutional taking.³³³ The Supreme Court's analysis of other land-use restrictions under the *Penn Central* analysis provides support for this position.³³⁴ As previously discussed, the nuisance-related takings cases suggest that a plaintiff may be able to

330. See Centner, *supra* note 140, at 122–124 (noting that the creation of an easement is not always considered a physical invasion). Some have noted that labeling a nuisance-related easement as a categorical taking could have significant consequences for a wide range of regulatory restrictions. See Richardson & Feitshans, *supra* note 263, 142–43 (noting that *Bormann* will likely remain a minority rule for these reasons); Adam Van Buskirk, *Right-to-Farm Laws as "Takings" in light of Bormann v. Board of Supervisors and Moon v. N. Idaho Farmers Ass'n*, 11 ALB. L. ENVTL. OUTLOOK 169, 191–92 (2006). But see Calvert G. Chipchase, *From Grand Central to the Sierras: What Do We Do with Investment-Backed Expectations in Partial Regulatory Takings?*, 23 VA. ENVTL. L.J. 43, 72 (2004) ("Courts and commentators are sometimes reluctant to apply regulatory takings doctrine to the full extent recognized by the Supreme Court. The rationale is often an abstract fear that landowners will reap unjust windfalls under the guise of 'just compensation.'").

331. See *supra* notes 231–251 and accompanying text. While the Iowa RTF statute in *Gacke* is similar to the North Carolina RTF law in some respects, the Iowa RTF statute notably differs from the amended North Carolina RTF law in that it lacks any sort of statutory waiting period before an agricultural facility may benefit from the nuisance protections. Compare N.C. GEN. STAT. § 106-701(a) (2015), with IOWA CODE ANN. § 657.11(2) (West 2015).

332. See *supra* note 330 and accompanying text.

333. See Centner, *supra* note 140, at 125–26 (noting that the creation of an easement is not always considered a physical invasion); Buskirk, *supra* note 318, at 192–96 (2006) (arguing in favor of analysis of right to farm as a regulatory taking under the *Penn Central* balancing test). See also Ball, *supra* note 296, at 854–55 (critiquing the approach taken in *Bormann* as overly protective of property rights, but arguing for the application of intermediate form of scrutiny).

334. See *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 324 (2002) ("[L]and-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as per se takings would transform government regulation into a luxury few governments could afford."); *Yee v. City of Escondido*, 503 U.S. 519, 528–29 (1992) (analyzing rent control ordinances in this way); Centner, *supra* note 140, at 129–35 (arguing in favor of such an analysis citing *Tahoe-Sierra* and *Yee*).

still succeed by showing “peculiar and substantial” damages.³³⁵ In this sense, *Penn Central* inquiry provides a useful framework in which to assess whether the harm goes beyond “incidental damages arising from a legalized nuisance.”³³⁶ Further analysis of the North Carolina RTF law under existing Takings Clause jurisprudence will help assess potential outcomes under these different approaches.

C. Analysis of North Carolina’s RTF Act under the Takings Clause

The extension of immunity to agricultural and forestry operations under North Carolina’s RTF statute raises constitutional concerns under the Takings Clause, particularly as a regulatory taking.³³⁷ Under a broad reading of the statute, the law could permit unbounded modifications in size or type of agricultural product for existing agricultural or forestry facilities.³³⁸ These expansive protections run contrary to the equitable considerations inherent within the “coming to the nuisance” doctrine.³³⁹ As previously discussed, there is some case law to support a finding that the maintenance of an ongoing nuisance could give rise to a compensable taking.³⁴⁰ Drawing an analogy to the award of permanent damages in nuisance law, a court could hold that the grant of nuisance immunity

335. *Richards v. Wash. Terminal Co.*, 233 U.S. 546, (1914). *See Moon v. N. Idaho Farmers Ass’n*, 96 P.3d 637, 645 (Idaho 2004) (recognizing the plaintiffs may be entitled to “special and peculiar” damages, but holding they failed to meet the burden of showing such damages existed).

336. *Richards*, 233 U.S. at 554; *cf. Ball*, *supra* note 296, at 850 n.170 (noting the applicability of the *Penn Central* inquiry to nuisance-related cases, but arguing that a heightened form of scrutiny is needed).

337. *See Centner*, *supra* note 140, at 88–89. Under the existing statute of limitations, landowners who have already been subjected to a nuisance from an agricultural facility for more than two years would likely be precluded from bringing an inverse condemnation action. *See* N.C. GEN. STAT. § 40A-51(a) (2015); *Peach v. City of High Point*, 199 N.C. App. 359, 368, 683 S.E.2d 717, 724 (2009) (“The rule is that a statute of limitations on an inverse condemnation claim begins running when plaintiffs’ property first suffers injury.”) (quoting *Robertson v. City of High Point*, 129 N.C. App. 88, 91, 497 S.E.2d 300, 302, *disc. review denied*, 348 N.C. 500, 510 S.E.2d 654 (1998)).

338. *See supra* Section III.D.

339. *See Centner*, *supra* note 140, at 140 (“Statutes that allow major expansion or extensive changes might produce an unconstitutional taking.”). Indeed, it is difficult to conceive of “background principles of nuisance and property law” that would justify this type of intrusion into the property rights of neighboring landowners. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992) (holding that regulations prohibiting the development of a beachfront property constituted a compensable taking unless the state met its burden of identifying a background principle of state law that supported a restriction).

340. *See supra* notes 292–300 and accompanying text.

results in the creation of a constitutionally protected easement.³⁴¹ However, considering the relevant case law regarding the constitutionality of RTF laws, it is doubtful that a court would hold that the nuisance immunity provided under the RTF law would give rise to a categorical taking under either the Fifth Amendment or the North Carolina Constitution.³⁴²

While often overlooked in the federal and state takings jurisprudence concerning the constitutionality of RTF statutes,³⁴³ the North Carolina RTF law could also be found unconstitutional as a regulatory taking under the traditional *Penn Central* balancing test.³⁴⁴ The expansive immunity provided under the North Carolina RTF law raises legitimate questions about whether the law's application is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."³⁴⁵

Applying the factors identified in *Penn Central*, an agricultural facility that undergoes a significant change in operation presents a strong argument in favor of finding an unconstitutional taking. For example, a neighboring farm that converts from a soybean farming operation to an industrial hog facility could raise significant concerns under the traditional *Penn Central* inquiry, assuming the defendant

341. See *Brown v. Virginia-Carolina Chem. Co.*, 162 N.C. 83, 87, 77 S.E. 1102, 1104 (1913) (noting that in a nuisance action for permanent damages, "the suit then amounts to the partial taking of another's property, and it becomes in effect a proceeding to condemn on the complainant's land an easement to operate the plant for all time in the specified way . . ."); *Broadbent v. Allison*, 176 N.C. App. 359, 363, 626 S.E.2d 758, 762 (2006) ("When permanent damages are at issue in a nuisance trial, and that nuisance 'operates as a partial taking of the plaintiff's property, any resulting benefit peculiar to him may be considered in mitigation of damages.'" (quoting *Brown*, 162 N.C. at 87, 77 S.E. at 1104)).

342. There remains a credible argument that the "nexus"/"rough proportionality" test that the Supreme Court has applied in the context of government permitting decisions may be applicable here. See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2600 (2013). However, in contrast to a permit requirement or fee, the creation of a nuisance poses a much more indirect imposition of liability. For this reason, it seems unlikely that this precedent would be extended to cover such cases. See *id.* at 2599–600 (emphasizing demand for monetary payment).

343. See Centner, *supra* note 140, at 129–35 (arguing in favor of the application of the *Penn Central* inquiry).

344. See *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 334 (2002) (noting that "if petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis"). Alternatively, a plaintiff may be able to succeed by showing the incurrence of "peculiar and substantial" damages. *Richards v. Wash. Terminal Co.* 233 U.S. 546, 557 (1914); see *Moon v. N. Idaho Farmers Ass'n*, 96 P.3d 637, 645 (Idaho 2004) (recognizing the plaintiffs may be entitled to "special and peculiar" damages, but holding they failed to meet the burden of showing such damages existed).

345. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

could successfully raise an affirmative defense under the RTF law.³⁴⁶ First and foremost, the imposition of nuisance immunity in such cases would have a significant economic impact on the neighboring landowner.³⁴⁷ The negative impact of CAFOs on neighboring property values has been well established.³⁴⁸ Assuming that the neighboring landowner preceded the defendant's change in operation, the consideration of "investment-backed expectations" could provide strong support in favor of a regulatory taking since the extent of the nuisance was unknown at the time of purchase.³⁴⁹ This determination would likely depend on the extent to which similar facilities were already operating in the surrounding area.

On the other hand, the "character of the government action" in this case may weigh against finding a compensable taking, particularly considering the stated policy of the RTF law to "conserve and protect and encourage the development and improvement of [] agricultural land and forestland."³⁵⁰ The ubiquitous nature of RTF laws across the country and longstanding application in North Carolina provide further support for finding the amended RTF law to be constitutional.

Nevertheless, the effective removal of many of the equitable considerations under the "coming to the nuisance" doctrine raises concerns about whether the amended RTF law represents a "public program adjusting the benefits and burdens of economic life to promote the common good."³⁵¹ As noted, the amended statute would allow industrial agricultural facilities to effectively tack on prior agricultural uses.³⁵² This retroactive application of the statute to existing homeowners living near smaller farms also "implicates fundamental principles of fairness underlying the Takings Clause"³⁵³ and requires longstanding residents of a community to endure the nuisance associated with CAFOs.

346. See *supra* Section III.D (discussing potential interpretations of the statute).

347. Richards & Richards, *supra* note 64, at 38–39.

348. *Id.*

349. In this sense, a case brought by a residential developer, as in *Durham v. Britt*, presents a much more compelling case for finding an unconstitutional taking than those presented by the homeowner in *Lindsey v. DeGroot* due to their respective "investment-backed expectations." See *Durham v. Britt*, 117 N.C. App. 250, 251, 451 S.E.2d 1, 1 (1994); *Lindsey v. DeGroot*, 898 N.E.2d 1251 (Ind. Ct. App. 2009).

350. N.C. GEN. STAT. § 106-700 (2015). Indeed, the consideration of the cumulative impacts of agricultural facilities on their surrounding communities may provide further support for such a finding.

351. *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

352. See *supra* notes 337–351 and accompanying text.

353. See *E. Enters. v. Apfel*, 524 U.S. 498, 537 (1998) (emphasizing the retroactive imposition of liability as a factor in favor of finding a compensable taking).

While North Carolina courts arguably have more leeway to find that a compensable taking has occurred,³⁵⁴ a plaintiff would still likely face a heavy burden bringing this claim absent evidence of a near or total depreciation in value in the property.³⁵⁵ However, a neighboring landowner may be able to argue that the grant of nuisance immunity to an industrial agricultural or forestry facility constituted “a substantial interference with elemental rights growing out of the ownership of the property.”³⁵⁶

CONCLUSION

By extending nuisance immunity beyond the traditional doctrine of “coming to the nuisance,” the North Carolina General Assembly has provided an unreasonable framework to accomplish the stated purpose of the law “to conserve and protect and encourage the development and improvement of its agricultural land and forestland” within the state.³⁵⁷ In contrast to the limitations previously recognized by the North Carolina Court of Appeals,³⁵⁸ the amended RTF law in North Carolina reflects a competing vision about the future of agriculture within the state. The extensive protections provided to all agricultural operations “without limitation” fail to account for the rights of neighboring landowners within these rural communities.³⁵⁹ As a result of the 2013 amendments, it remains to be seen how the courts will interpret the statutory revisions. However, the constitutional concerns raised by these amendments favor a narrow interpretation of the law that is consistent with the original intent of the act.

Contrary to the stated purpose of the law, the RTF law’s blanket protections for CAFOs and industrial forestry operations against nuisance claims by neighboring landowners raises legitimate questions about what kind of agricultural land and forestland the government should protect.³⁶⁰ As seen from *William Aldred’s Case*, as

354. As seen in *Gacke*, federal takings law does not preclude a state court from providing additional protections for rights that may not be expressly recognized under the United States Constitution. *Gacke v. Pork Extra, L.L.C.*, 684 N.W.2d 168, 174 (Iowa 2004); see Centner, *supra* note 140, at 140–41.

355. See *supra* notes 289–295 (discussing the interpretation of taking claims by North Carolina state courts).

356. *Kirby v. N.C. Dep’t of Transp.*, __, N.C. __, __, 786 S.E.2d 919, 925 (2016) (quoting *Long v. City of Charlotte*, 306 N.C. 187, 198–99, 293 S.E.2d 101, 109 (1982)).

357. N.C. GEN. STAT. § 106-700 (2015).

358. See *supra* Section II.C.

359. N.C. GEN. STAT. § 106-701(b) (2015).

360. See Reinert, *supra* note 16, at 1738.

well as the pending tort litigation in North Carolina, land use conflicts between agricultural and non-agricultural uses will continue to create tension between the respect for property rights as well as the best use of North Carolina's resources. The extensive protections provided to agricultural facilities unduly limit the fair allocation of resources and rights under the law. A more balanced approach is needed to provide a sustainable model for agricultural development in the state.

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